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ABSTRACT
Students are making increasingly strong efforts to excercise what they consider to be their rights, and it is becoming ever more crucial to define what these rights are and what the concept of "due process" means. This report explains the meaning of procedural due process: the concept of "dueness" and the student's "right" to due process. In addition it discusses: (1) the legal relationship between the student and the institution: the contract theory, the concept of in loco parentis, the fiduciary theory, and the constitutional theory; (2) the present state of disciplinary procedures within the academy and elements of fair and just dealing in student discipline cases which should meet the "due process" requirement; (3) methods for initiating an adjudicatory system and procedures which will assure that these requirements are met; (4) some minor issues which surround the main topic, such as violation of a criminal or civil law, double jeopardy, self incrimination, right to a private or public hearing and severance, search and seizure, warrants, and record keeping; and (5) a rationale for the positions taken. A sample statement concerning student "due process" and an annotated bibliography conclude the report. (AF)

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A White Paper on Procedural Due Process
For Public College Presidents, Administrators
and Student Leaders

July 1970

Mr. Fischer, Assistant Dean of the Georgetown University Law Center, was commissioned to prepare this report by the American Association of State Colleges and Universities.

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Thomas C. Fischer

# DUE PROCESS IN THE STUDENT-INSTITUTIONAL RELATIONSHIP

AASCU STUDIES 1970/3

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# INTRODUCTION

By James E. Perdue
*President, State University College at Oswego, New York, and member of the Board of Directors of AASCU*

At times many agencies in our society have operated as if only certain constituencies had rights, freedoms and responsibilities. Recently, in institutions of higher education, students have asked for fuller recognition within the academic community.

In responding to this call, the constituent groups which make up the academic community must understand the framework from which each other body is operating.

Students must be considered in light of their status on campus, and of their status as citizens. In this period of increasingly strong efforts by students to exercise what they consider to be their rights, there is, as never before in the history of higher education, a need to define these rights. And, when some students step across proper bounds and must be disciplined, the concept of "due process" becomes crucial. This is especially true because of constraints imposed by some state legislatures and by legal interpretations handed down by courts.

Not only is due process important, but the term and its implications are easily misunderstood by students, faculty, and administrators alike. Few people in the college community are entirely certain as to what due process is, how it works, or what it should mean to them.

Due process cannot be separated from a college judicial system. Therefore, Thomas C. Fischer of the Georgetown University Law Center was invited to use his extensive background in colleges and universities to suggest an approach to college judicial matters that would have meaning and substance. While extensive footnotes are provided primarily for the university's counsel, the text is clear and useful to faculty and administrators with no legal background.

This document is meant only as a guideline for colleges and universities. It could not be adopted word-for-word as a procedure for any school, because of local exigencies. But as a guideline, *Due Process in the Student-Institutional Relationship* should prove to be a valuable resource.

# PREFACE

As is true of any concept which becomes an issue between two warring factions, the legal concept of "due process" has all but lost its original meaning.* It is not the intent of this paper, however, merely to return the concept of procedural "due process" to its proper Constitutional perspective. Nor is it the paper's purpose to analyze the way in which the concept of due process is now being applied to the student-institutional relationship by courts of law. Both have been exhaustively done elsewhere.[1] More importantly, such an approach would ignore the fact that, until recently, courts have moved very cautiously in this area, so that many of the more progressive decisions regarding student "due process" are probably still in the courts, or still to be precipitated on college campuses across the country. Thus, to do no more than to state again the present legal status of student "due process" would be to take you only around the next bend of what promises to be a considerably longer road.

The following is, therefore, an attempt to distill into one short, readable document (1) a lay understanding of the *real* meaning of "*due* process," (2) an appreciation of the current status of the academy before the courts, (3) the elements of fair and just dealing in student discipline cases which should meet the legal "due process" requirements, (4) methods for initiating at your institution an adjudicatory system and procedure which will assure that these requirements are met, (5) a variety of minor issues which surround the main topic, and (6) a rationale for the positions taken which seems both logical and fair to students while protecting the authority of the university which it is the responsibility of its administrators to exercise – bearing in mind that not every student, faculty, parent, or public critic of the academy will ever be completely satisfied with its operation.

This document does not attempt to play both sides of the street. It is intended for the benefit of high university officials – especially presidents, legal counsel and student personnel officers – and responsible student leaders. It proceeds on the assumption that it is in the best interests of the entire community that the university function as free as possible from external or internal disruption, but not that this peace be obtained at the expense of individual rights. In a sense, it attempts to balance the interest of the university in the orderly conduct of its business with the right of the individual to be heard, particularly where he is threatened with great penalties or the loss of valuable rights.

The paper deals only with public institutions of higher education. There are dramatic differences in the relationship between the student and his university in public and private schools. Public schools are embued with more of a public trust and mission, and are subject to certain sections of the United States Constitution concerning the behavior of governmental agencies. Proprietary institutions must observe certain personal rights, but are more free to set the terms of the relationship than are the public institutions.

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**Author's Note:* In reality, there are two types of "due process" – procedural and substantive. This paper deals only with the former – *procedural* due process.

*Procedural due process* may be defined as a quantity and quality of adjudicatory process, which through its operation, assures persons subjected to it that they will not be deprived of "life, liberty or property" – or any other constitutionally or legally guaranteed right, privilege, or immunity – without "due process of law". This usually means notice, a fair and impartial hearing, and such other procedural protections as may be necessary in light of the seriousness of the wrongdoing complained of and the penalty faced. These matters will receive considerably greater attention in the paper which follows.

This paper does *not* deal with substantive due process, except to suggest that rule-making be held to the same standards of reasonableness as procedural due process, and avoid unnecessary infringement upon legally or constitutionally protected rights.

*Substantive due process* may be thought of as a Constitutional requirement affecting the rule-making function, which prohibits the authorization of illegal or improper procedures, or the passage of rules or regulations which authorize illegal activity, prohibit legal and reasonable activity, or which are otherwise illegal, arbitrary, discriminatory, or unreasonable. Failure to enact reasonable rules and regulations and avoid unnecessary infringement of rights and privileges, would be a violation of *substantive* due process, even though a violator of those rules might be given every reasonable protection (*procedural* due process) at his hearing.

To illustrate, suppose the university's rule-making authority *unreasonably* restricted the freedom of association or expression, or *unreasonably* discriminated on the basis of race or sex in the use of university services and facilities. Even though the accused violator of these rules might be given every procedural protection recommended in this paper (in other words receive *procedural* due process), the offender would still have been denied First and Fourteenth Amendment freedoms by the *substance* of the rule.

The same considerations concerning *unreasonable* discrimination and *unreasonable* restriction of legally protected rights should characterize the rule-making process – and the resultant rules – as characterize the procedural processes by which alleged violations of those rules are investigated, substantiated, appealed and punished.

Naturally, there is some "balancing" between the students' unfettered activity on-and-off campus and the lawful educational mission of the institution in determining what constitutes a *reasonable* rule or process.

*See* P. Kauper, *Constitutional Law: Cases and Materials* 753-56 (2d ed. 1960); Monypenny, *The Student as a Student*, 45 Denver L.J. 649, 651 (1968) [hereinafter cited as *Monypenny*]; *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886 (1961).

[1] *E.g.*, *Legal Aspects of Student - Institutional Relationships*, 45 Denver L.J. 497-678 (1968); Institute of Higher Education, University of Georgia, *The Legal Aspects of Student Discipline in Higher Education* (1969) [hereinafter cited as *Georgia*].

This paper's discussion of the relationship, however, does not depend entirely on strict legal requirements for public as opposed to private schools. It is a study first of what is legally required, and subsequently of what would be fair and equitable to all parties. It is a study in human as well as legal relationships. In this sense it may be useful to private as well as public schools.

Because the ideas and reasoning are interrelated, it is suggested that the entire document be read before individual ideas are picked out and discussed.

A highly selective, annotated bibliography appears after the main text, both to show the document's main sources and to distinguish required reading from the plethora of literature on this topic.

I am deeply grateful for the services of Noel Kane, my previous research assistant, who began the research for the paper and edited substantial portions of the original draft; my present research assistant, Cary Pollak, who contributed many hours to the research, discussion and evaluation of various sources and citations; and the untiring efforts of my secretary, Mrs. Echo Innes, who has assisted in every phase of the paper's development.

THOMAS C. FISCHER

Washington, D.C.
January, 1970

# BIOGRAPHICAL NOTE

Thomas C. Fischer, 32, combines experience in higher education administration with training in law.

He received his A. B. with honors in history from the University of Cincinnati in 1960, then did graduate work in history at the University of Washington. While serving as advisor to the Association of Men Students at the University of Washington, he became interested in the legal relationships between educational institutions and students because, he says, "I was constantly being inhibited from pursuing certain activity programs because of the legal implications to the university. I decided if I was going to fight them (university counsel) I would have to join them, so upon completion of my master's thesis in 1962, I entered Georgetown University Law Center."

While a law student, he was a special assistant to the Director of Student Personnel at Georgetown. In 1964, he took a job as Assistant Director of student facilities at the Chicago Circle campus of the University of Illinois. He completed his legal studies for Georgetown *in absentia,* and received a J. D. degree in 1966. His law school thesis was on the legal rights and responsibilities of all members of the university community, as they relate to the corporate entity of the university. He returned to Georgetown as Assistant Dean of the Law Center in the Fall of 1966. He has recently served as a special adviser to a Georgetown University task force to devise a new student disciplinary hearing process. His interest in conducting the present study was spurred, he says, by his discovery in talking with many college presidents that they "did not understand many of the legal terms being bandied about by students," and that "attorneys took too legalistic a view, and were not very sensitive to student personnel considerations and the realities of college administration." He has attempted to use his background in these two fields in an effort to bridge the gap.

# THE MEANING OF DUE PROCESS

## I. Generally

The concept of "due process" is derived from the Fifth Amendment to the United States Constitution, which says, "No person shall . . . be deprived of life, liberty, or property, without *due process* of law."[2] As it appears there, and as it is applied to the states by the Fourteenth Amendment,[3] it seems to imply a loss to the individual of "rights" somewhat more serious than those which students allege are being infringed by the academy without "due process."

It would appear, therefore, that some students have persuaded concerned administrators to grant considerably more process than is legally *due* them in a given set of circumstances. That does not mean, however, that students receive due process in every circumstance.

To begin any discussion of what *right* a student has to "due process" in an institutional setting, it is first necessary to return "due process" to its proper perspective, establish just what "process" is *due* the student, and discover how his "right" to it arose.

## II. The Concept of "Dueness"

The most important and often the most misunderstood feature of due process is the question of its "dueness." In other words, what degree of "process" (protection) is "due" (appropriate) under a given set of circumstances, before punishment of a given severity can be imposed?

"Due process" may thus be defined as an *appropriate protection* of the rights of an individual while determining his liability for wrongdoing and the applicability of punishment. As the punishment should fit the crime, so the degree of legal process (*i.e., due* process) necessary to protect an accused person from arbitrary and capricious conviction should be appropriate to both the seriousness of the act complained of and the magnitude of the penalty faced if he is found guilty.

Thus, where the violation is minor (noise in the dormitory), and the penalty nominal (restriction of weekend hours), disciplinary action may be taken by any competent university official with only the opportunity for the accused – and perhaps a few witnesses – to be heard. Where the offense is more serious (e.g. destruction of university property) or more frequent (e.g. persistent noise), and the punishment faced more severe (suspension/expulsion), and particularly when the student denies that he is guilty, a greater degree of process is "due" – even up to a full adversary hearing – to fully protect the Constitutional rights of the accused to a fair adjudication of whether he is guilty and, if he is, what punishment is appropriate.

Naturally, it is preferred that some semblance of open and impartial proceedings be used in every contested case, but the law courts' *insistence* upon such processes increases sharply when offenses become more serious and the penalties more severe, especially when the penalties, if imposed, would cause the student to lose rights or freedoms normally available to other students in the community.[4]

In situations such as campus riots, in which there is an immediate need for temporary relief, the sanctions of temporary suspension and/or removal may be valid when they come after reasonable requests to desist and disperse during a riot situation. But these sanctions must be viewed as temporary. Any severe or permanent punishment meted out at the time of the infraction makes moot the questions of the guilt of the accused and the appropriateness of his punishment, thus denying him *any* due process. Once order is restored, appropriate hearings must be held.

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[2] U.S. Const. amend. V (emphasis added).

[3] The XIV Amendment applies to *government* action which is not *federal* government action. It is generally considered to proscribe the infringement of Constitutional freedoms by state or lesser governments. *See* C. Antieau, *Commentaries on the Constitution of the United States* 96-98, 143-46 (1960); U.S. Const. amend. XIV.

[4] *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961), *cert. denied*, 286 U.S. 930 (1961) [hereinafter cited as *Dixon*], is the granddaddy of student-institutional "due process" cases. This is not because it was the first occasion on which a student challenged institutional authority or process (cases of this sort date back at least to the 1920's), but because this was one of the first occasions on which a court spelled out with some specificity the "due process" safeguards to which the student was entitled when facing serious institutional penalties. (In the *Dixon* case the complaint was expulsion without notice or a hearing.) The forward-looking language of the *Dixon* decision has been approved in almost every subsequent court decision involving "due process" in the student-institutional setting and has remained substantially unchanged during nearly a decade of steadily increasing legal activity in this area.

*General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133, 147-48 (W.D. Mo. 1968) [hereinafter cited as *Missouri*] sets a unique precedent because, in the face of several student-institutional litigations, the United States District Court for the Western District of Missouri met *en banc* (all of the judges) and laid down a variety of guidelines for dealing with this type of recurring phenomenon. This 15-page decision really goes beyond *Dixon* insofar as it traces the role of education in the American lifestyle, and elaborates the considerations on both sides of the student-institutional disciplinary issue. Although this decision is not binding on federal or state courts outside the Western District of Missouri, it is a well thought out and thorough presentation and will undoubtedly have considerable impact on future court discussions of this issue.

*See also Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961) (suspension) [hereinafter cited as *Knight*]; *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967) (dismissal) [hereinafter cited as *Wasson*]; *Esteban v. Central Mo. State College*, 277 F. Supp. 647 (W.D. Mo. 1967) (suspension) [hereinafter cited as *Esteban* I]. All of the foregoing approve *Dixon*. *Cf. Esteban v. Central Mo. State College*, 290 F. Supp. 622 (W.D. Mo. 1968) [hereinafter cited as *Esteban* II].

It is important to remember, however, that the procedural protections ("due process") guaranteed to an accused vary according to the gravity of the offense of which he is accused and the penalty he will face if found guilty. In the institutional setting it is as silly to give a full adversary hearing to a student accused of having an overdue library book and facing a twenty-five cent fine, as it would be to entrust the fate of an accused arsonist who is about to be expelled from the academy to the sole judgment of a junior dean. The lesson should be clear, therefore, that the institution's disciplinary system must be simple enough to deal with small infractions and minor penalties without undue processes or delay, and, at the same time, complex enough to handle contested or serious cases with appropriate speed, detachment, objectivity, and regard for the rights of the accused.

The present Supreme Court test of "dueness" may be paraphrased as *fundamental concepts of "fair play"*.[5] This is probably as liberal (and as vague) a judicial standard as has been adopted by the court in any area of the law. At the same time it is broad enough and flexible enough to last in the Court's jargon for some time, adapting easily to changing conceptions of what is meant by "fair play." Using "fundamental concepts of fair play" as their standard, it seems likely that a reasonably prudent administration – with student assistance – could design a hearing system for disciplinary cases which could meet this standard, even in sensitive cases.[6]

## III. The Student's "Right" to Due Process

Now that we have established the nature of "due process," we must ask how a student acquires a *right* to it in the first place, and in what types of situations the institution threatens to infringe upon this right. The answer to the first part of the question is obvious – "due process" is the Constitutionally guaranteed right of *every* citizen. The answer to the second part of the question is less clear.

The areas in which an institution may not infringe upon a student's rights are at present being broadened by court decisions. It is in large part the purpose of this paper to indicate the possibly objectionable areas, and how to provide appropriate safeguards in student disciplinary cases to avoid court attack based on the academy's failure to accord fundamental fairness to the student in these situations.

The most obvious reason for guaranteeing the *right* of due process to a student is the fact that students are citizens. As such, they are entitled to all the rights guaranteed a citizen by the United States Constitution. They do not, nor can they be required to, sacrifice their rights as a condition of entering, or continuing at, the academy.[7]

These include the rights to "life, liberty, [and] property."[8] The student's right to life should never become involved. His right to *liberty* (his protection against unreasonable search and seizure and confinement, as well as his guarantees of freedom of speech, association, and assembly, etc.) is involved, however, whenever the institution seeks to limit these rights more than is necessary to effectively operate the academy, or to a greater degree than is enjoyed by his fellow students.

From the wording of court opinions it seems increasingly likely that the student's right to property may also be involved.[9] This doctrine is still a little remote, but the increasing value of a college education and the realities of movement of "undesirable" students from school to school have forced a close look at the treatment of any student-citizen who is about to lose his opportunity to obtain a higher education and all the advantages that that implies in

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[5] This paraphrase is derived by reading together a number of Supreme Court statements regarding due process. *Fed. Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940) *quoted in Communist Party of the U.S. v. Subversive Activities Control Bd.*, 254 F.2d 314, 327 (D.C. Cir. 1958) (fundamentals of fair play); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (traditional conception of fair play); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) *quoted in Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (traditional notions of fair play); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring) (the rudiments of fair play). The actual phrase, "fundamental concepts of fair play", is used in *Missouri* at 148, although this is not a Supreme Court decision. "Fundamental fairness" is the way in which the same idea is characterized in A.B.A. Comm'n on Campus Gov't and Student Dissent, *Report*, at 26 (1970) (unpublished draft) [hereinafter cited as *A.B.A.*].

[6] If a talisman is needed to describe the procedural system which you hope to design, "fundamental fairness" would be it.

[7] *Tinker v. Community School Dist.*, 393 U.S. 503, 506-07 (1969); *Barker v. Hardway*, 283 F. Supp. 228, 238 (S.D. W.Va. 1968), *aff'd without opinion*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969) (Fortas, J., concurring) [hereinafter cited as *Barker*]; *Dixon* 156. *See also Missouri* 143; O. A. Singletary, American Council on Education, *Freedom and Order on Campus* 7-8 (1968) [hereinafter cited as *Singletary*].

[8] U.S. Const. amends. V, XIV. For the enumeration of other specific rights guaranteed to citizens by the Constitution, see *amends.* I, II, IV, VI, VII and VIII, of the "Bill or Rights."

[9] *See, e.g., Dixon* 157, "Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value"; *Knight* 178 (approving *Dixon*), "The defendant's argument that the interest which the plaintiffs have in attending a state university is a mere privilege and not a constitutional right was specifically rejected in the Dixon case, and the Court thinks rightfully so. Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training."; *Esteban* I 651, "Whether the interest of the student be described as a right or a privilege, the fact remains it is an interest of extremely great value and is deserving of constitutional protection." *See also Monypenny* 651, 653, 666. Interestingly enough the case of *Madera v. Bd. of Educ.*, 386 F.2d 778 (2d Cir. 1967) [hereinafter cited as *Madera*] would cast the same interest in terms of "liberty", at 783-84: "The 'liberty' mentioned . . . means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." This case, however, involved a 14-year old seventh grader in a public junior high school system, which he was legally required to attend.

our society. This view would receive even greater evidentiary support in any court – which includes most higher courts – which allows public policy arguments to be introduced. The reasoning would go something like this:

> Any citizen who is born or grows up with the reasonable expectation that he may receive a college education from a publicly-supported college, and who qualifies for admission to that college (I will not go into the admissions practices of publicly-supported schools except to say that they must be free from *unreasonable* bias),[10] and who can afford to attend, *if he registers,* becomes a member of that academic community for limited, "quasi-contractual" purposes. The terms of the "quasi-contract" may be collected from the institution's various inducements to attend (the catalog, handbook, oral representations of a recruiter, etc.), and are *offered* by the university to the student through the act of granting admission, and *accepted* by the student through the act of matriculation.
>
> Because the student casts his lot with one institution and, in effect, rejects the rest when he enrolls, and because the impact of excluding him from the institution which he did choose would have the probable effect of excluding him from any institution which he did not choose – and which owes him, at that point, no obligation – his exclusion, in the *absence* of due process, would have the effect of denying him the degree (education) which he had reason to expect when he enrolled. This expectation is the "property" in question.

This does not mean that a school cannot exclude a student for just cause. It *does* mean that they cannot curtail his freedom ("liberty"), or exclude him ("property") for *less* than "just cause,"[11] established through an "adequate" and "fundamentally fair" (due) system of adjudication (process).

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[10] This is based on the so-called "equal protection" clause of the Constitution, U.S. Const. amend. XIV, article 1; *see also Missouri* 144.

[11] *Goldberg v. Regents of the Univ. of Calif.*, 248 Cal. App. 2d 867, 879, 57 Cal. Rptr. 463, 472 (1967) [hereinafter cited as *Goldberg*].

# THE LEGAL RELATIONSHIP BETWEEN THE STUDENT AND THE INSTITUTION

## I. Generally

A slight digression seems necessary at this point to explore the legal relationship between student and institution.

The idea was expressed in the closing paragraphs of the previous section that the relationship between student and institution was one of "quasi-contract." "Contract" is the legal theory most frequently used to describe the student-institutional relationship.[12] Despite its popularity, it is woefully inadequate to describe all the incidents of student-institutional interaction. Other legal theories used to describe the relationship seem even less adequate.

Unfortunately, continuing efforts to reduce this relationship to some precise, acceptable definition have obscured the more immediate needs of the academy to cope with student-institutional interaction where sore points already exist. I caution you most severely against floundering in this definitional backwater,[13] while allowing antiquated systems – or non-systems – of student discipline to give students legitimate cause for alarm, and administrators nightmares in the courts.

Because the administrator will sooner or later be called into battle over the nature and applicability of these legal theories, however, I have taken a moment here to describe them and list what I consider to be their principal shortcomings.

## II. The Contract Theory

The "most common refuge"[14] of persons describing the relationship between student and institution is that of contract.[15] A contract may take many forms: *specific* (a formal, signed document of many clauses, incorporating catalogs, handbooks, etc.); *implied in law* (because a contract of some sort *should* exist); *implied in fact* (from the behavior of the parties); or a *quasi-contract* (implied by the courts from the actions of the parties). Nevertheless the contract theory is still full of holes.

Assuming that a comprehensive document could be drawn up (a good one might run well over one hundred pages), it would still not cover the thousands of minor details which any administrator knows are bound to come up during the four-year stay of the average undergraduate. Further, the entering student who signs such a contract (if he would sign such a monstrous document at all) would generally be a minor, and thus liable only for his contracts for "necessities of life."[16] Although values are changing, it would still be a very untenable argument that a college education was a "necessity of life."[17]

Moreover, it would be the minor student's parents, not the student himself, who would be liable for his contracts for necessities of life, at least until he reached his majority or became emancipated.[18] Obviously, it would be to the parents' advantage *not* to join in the contract.[19]

There are other deficiencies in the contract theory as well. Since the student cannot negotiate its terms, the contract is one of "adhesion," whose terms he must simply accept, or "adhere" to, as he finds them.[20] Courts uniformly interpret contracts of adhesion most strictly against the drafter, or find them unconscionable and refuse to enforce them at all.[21] If a court voided the formal, signed contract and substituted a quasi-contract, its terms would be derived from the facts and circumstances of the relationship. In this manner the court may reach a result which neither of the parties intended.[22]

Even if the courts found that a valid contract had been executed, its terms would be continually modifiable by the actions and representations of the university's "agents."

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[12] *Monypenny* 651; New York University School of Law, *Student Conduct and Discipline Proceedings in a University Setting* 5 (1968) [hereinafter cited as *N.Y.U.*].

[13] "What thinking there has been in the academic community about the relationship of students to the university has primarily centered on theories that no longer seem relevant." *N.Y.U.* 4. *See also Monypenny* 658.

[14] *N.Y.U.* 15.

[15] The leading case is *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928), although that case involved a *private* school. The relationship between student and institution in private schools has long been considered to be much more one of contract than in public schools. *See, e.g., Dixon.*

[16] 2 Williston, *Contracts* §240 (3d ed. 1959).

[17] 2 Williston, *Contracts* §241 (3d ed. 1959); *Commonwealth v. Camp*, 11 Chest. 214 (Pa. Comm. Pl. 1962).

[18] That is, legally separated from his parents or another adult's charge. 2 Williston, *Contracts* §247 (3d ed. 1959).

[19] *Trustees of Columbia Univ. v. Jacobsen*, 53 N.J. Super. 574, 148 A.2d 63 (1959). Parents have been held free of obligation for the support of minor children beyond the common schools, absent a contract or some special circumstance; *Commonwealth v. Camp*, 11 Chest. 214 (Pa. Comm. Pl. 1962). To remedy this situation, some states have passed legislation making it possible for a minor to sign a valid contract or note to pay for his higher education. *E.g.*, Ill. Rev. Stat. ch. 29, §43 (1969); Mo. Rev. Stat. §431.067 (1965); N.C. Gen. Stat. §116-174.1 (1963).

[20] *N.Y.U.* 6.

[21] 1 Corbin, *Contracts* §128 (1963); 4 Williston, *Contracts* §621 626 (ed ed. 1959); *N.Y.U.* 5.

[22] 1 Corbin, *Contracts* §19 (1963); 1 Williston, *Contracts* §3A (3d ed. 1959).

These actions, if relied upon by the student in good faith, would have the effect of continuously modifying the terms of the so-called "contract."[23]

Clearly, the contract theory does not adequately cover the *whole* relationship. That is *not* to say, however, that the student and university cannot enter into more limited contracts such as those for room, board and tuition. But ultimate disciplinary authority, which some schools have sought to obtain through an *admissions* "contract," would not appear to be the proper subject of such a contract, nor blend well with this legal theory.[24]

## III. *In Loco Parentis*

Everyone seems happy to concede that *in loco parentis* is defunct.[25] The idea that universities do, or ought to, stand in the place of the natural parent in carefully and paternally guiding the student's development should really be as much an anathema to the institution as it is to the student. At worst it fixes more responsibility on the institution than it should seek, or could appropriately exercise. At best it does not seem to fit modern concepts of education which would thrust more responsibility upon the student to aid his development of mature standards rather than insulate him from life. The *in loco parentis* concept is simply too devoid of common sense in modern times, and too fraught with responsibility for the academy, to be reasonable.[26]

Nevertheless, there are some areas of the student-institutional relationship in which *in loco parentis* still applies, *e.g.*, university regulations governing the possession and use of firearms in university dormitories.[27] By its very nature, however, *in loco parentis* is a red flag to students. It would serve the institution best in the form of a ringing affirmation that it is gone forever.[28]

## IV. The Fiduciary Theory

The idea that the university acts in a fiduciary capacity towards its students is a relatively recent one.[29] A good deal has been written about it in recent years,[30] but it has been nowhere convincingly advanced, nor has it been adopted by any court in describing the relationship between institution and student.[31]

Its most notable flaw is the fact that the fiduciary relationship in law is an extremely precise one. Due to the high degree of responsibility and trust placed in the fiduciary, and the immense public policy interest in protecting the beneficiary from fraud or misuse of funds, the beneficiary is able to call the fiduciary to a strict accounting *at will.* One does not have to be an attorney to sense that this is an unworkable idea.

The questions left unresolved by this theory are many: Can the property in which the beneficiary has an interest be precisely defined? What are the "terms" of the trust? How can the university cope with constantly changing numbers of "beneficiaries"? Are alumni, parents, faculty, and taxpayers equally "beneficiaries"? Could *they* call for an accounting at will? Would students consent to a passive role in the operation of the university, and if they would not, wouldn't they unbalance the fiduciary's power to control the trust which makes accountability at will desirable? How could the university give an accounting whenever hundreds – even thousands – of students, parents and alumni "beneficiaries" will it, if the school means to carry on its educational functions as well?

Clearly this view of the student-institutional relationship is as unsatisfactory as the others in characterizing the whole. Nevertheless, there is an element of fiduciary responsibility in *certain features* of that relationship, *e.g.*, a strict accounting of the school's allocation of student activity or student health fees.[32]

## V. The Constitutional Theory

This theory was explained in some particularity above.[33] It tells very little about the student-institutional relationship *per se,* except that a public institution is

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[23] For a good survey of the impact and extent of agency power consult Seavey, *Agency Powers*, 1 Okla. L. Rev. 3 (1948).

[24] *Monypenny* 652, 656; Van Alstyne, *The Student as University Resident*, 45 Denver L.J. 582, 585 (1968) [hereinafter cited as *Van Alstyne*].

[25] McKay, *The Student As Private Citizen*, 45 Denver L.J. 558, 560 (1968); Address by J. Perkins, President of Cornell University, "The University and Due Process," Annual Meeting of the New England Association of Colleges and Secondary Schools, in Boston, Dec. 8, 1967, *in* J. Perkins, *The University and Due Process* 6 (published by the American Council on Education 1967) [hereinafter cited as *Perkins*], *also in* Chronicle of Higher Education, Dec. 21, 1967, at 5, col. 3; *Singletary* 8.

[26] *N.Y.U.* 4-5.

[27] A more questionable example is found in *Hybarger v. Huzovick*, 110 Ohio App. 87, 196 N.E.2d 795 (1963), wherein a housemother accepted service of process for a student living in a dormitory which she supervised.

[28] *See* note 25 *supra.*

[29] The theory seems to have originated with Professor Seavey, *Dismissal of Students: "Due Process"*, 70 Harv. L. Rev. 1406, 1407 n. 3 (1957). A fuller development of the idea appears in Goldman, *The University and the Liberty of its Students–A Fiduciary Theory*, 54 Ky. L.J. 643 (1966). According to principles drawn from the law of Agency, the fiduciary (the university in this context) is an agent acting for the benefit of his principal (student). One duty owed by the fiduciary to the principal is full disclosure of all relevant facts related to any transaction made pursuant to the relationship.

[30] Articles cited note 29 *supra*; *N.Y.U.* 6-7; Lunsford, *Who Are Members of the University Community?*, 45 Denver L.J. 545, 549 (1968); *Monypenny* 650, 652.

[31] *Monypenny* 650; Cohen, *The Private-Public Legal Aspects of Institutions of Higher Education*, 45 Denver L.J. 643, 647 (1968).

[32] *N.Y.U.* 7.

[33] *See* pp. 2-3 *supra.*

prohibited from unreasonably proscribing, or requiring the forfeit of, Constitutionally protected rights, as a condition of admission to, or continuation at, the academy. It is difficult to believe that any institution would affirmatively attempt to curtail a student's legitimate Constitutional rights. One is left to conclude, therefore, that it is not the institution's purpose to deny "due process" in its relationships with students but rather that it falls unwittingly into the trap of doing so when acting under stress or by surrendering the student to artlessly drawn disciplinary procedures.

## VI. Conclusion

It should be obvious from the foregoing that no one legal theory is completely satisfactory to describe the nuances of the student-institutional relationship.[34] The relationship between institution and student is probably best described as just that – a "relationship." It is built largely on contract (both express and implied) the terms of which are altered continuously through the actions of university "agents", and involves limited fiduciary, *in loco parentis,* and Constitutional features. Getting mired down in the search for one definition of that relationship often obscures, and thus prevents the resolution of, a much more fundamental question, which is: "How will the student and the institution interact when there is difficulty within the academy?"

It is clear that a student possesses certain Constitutional rights as a citizen, and that he takes these rights with him into the academy.[35] In fact, most institutions give their students more rights than are *guaranteed* to any citizen.[36] It seems unlikely, however, that these "rights" will ever be completely agreed upon, or that they will ever be reduced to an adequate, comprehensive, acceptable, valid and enforceable contract. Consequently, a *system* must be devised to deal with alleged infringements of these rights when they arise. This system should be speedy, impartial, fundamentally fair, and contain adequate "due process" safeguards to protect the Constitutional rights of the student. Above all, the system should operate in such a way that it avoids external interference with the internal management of the academy.

The problem of many schools is that "student activist(s) . . . [are] exploiting [the administrators'] lack of experience [with the law] to confound [them], and in a surprising number of cases, win concessions which have little basis in law or educational policy."[37] These concessions may prove to be as damaging to the student as they are to the academy, for, even though they abound, they still may not protect the rights to which the student-citizen is entitled. This problem is likely to continue,[38] however, until administrators inform themselves as to the real requirements of the law and the courts, and develop disciplinary systems which will insure that legitimate rights are protected, while at the same time providing speedy and substantive justice for those students who would interfere with the proper mission of the institution.

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[34] "In analyzing these corporate relationships [between student and institution], it is apparent that, rather than one particular legal principle controlling the entire relationship, a series of legal principles are directly and appropriately applicable to its various aspects." Stamp, *Comment*, 45 Denver L.J. 663, 666 (1968). Mr. Stamp is the University Counsel of Cornell University.

[35] *See* p. 2 & note 7 *supra.*

[36] It would be a mighty poor university, and probably no "community" at all, if it gave to its students no more than their bare Constitutional rights as now interpreted by the Supreme Court. *Monypenny* 648.

[37] Stamp, *Comment*, 45 Denver L.J. 663, 664 (1968).

[38] E. Wentworth, *Colleges Facing Test on Justice*, Washington Post, Sept. 7, 1969, at B1, col. 5.

# THE PRESENT STATE OF DISCIPLINARY PROCEDURES WITHIN THE ACADEMY - A HOUSE IN DISARRAY

## I. Introduction

Almost all authors agree that the university is a "special", rather than a "general" purpose community.[39] Generally speaking, its purpose is "to educate young people, to provide a storehouse of existing knowledge, and to add to this knowledge through scholarship and research"[40] for the benefit of the greater community, which supports it, and by-and-large leaves it alone to accomplish its task.[41]

It is not the university's purpose to be a microcosm of the greater community.[42] It has a special purpose and design, and only those activities which are reasonably related to the achievement of that purpose are proper to the academy. In pursuing this purpose, however, the academy should be as free as possible from both external restraints (the courts and the legislatures) and internal ones (dissident students).[43]

The courts have traditionally taken a hands-off approach to educational institutions,[44] but it does not appear that legislators will be as patient or detached.[45] Although direct and substantial intervention seems unlikely, at this writing legislative patience is obviously wearing thin.[46]

Because the university's administration and faculty have the legal power and responsibility to govern the university in furtherance of its proper mission,[47] it is natural to look first to these persons first for control of the disruptive elements which would thwart that mission. That is to say that the first opportunity to control university campuses will be given to the supervising officials, and only after they fail in this task will other segments of the community which may be charged with institutional control (the courts and the legislature) move in.

In this, as in many areas of institutional life, the best defense is a good offense.[48]

It is of little value to fully understand a student's "right" to, and need for, due process and equal protection only when your university is already on the verge of anarchy, or already deeply and expensively involved in litigation. A system of protection, to be functional, must be in existence and operative before an "incident" occurs, and not devised in haste after the fact.

What is needed at each institution is a system of control which will: (1) reduce the potency of any movement already afoot whose purpose it is to wrest "power" over student life from duly constituted authorities, and (2) set up in advance of major disciplinary problems, a system for dealing with them which is impervious to the charge that it denies the student "due process."

The first goal can be easily accomplished through an announcement that the university's rules of conduct are going to be thoroughly reexamined with participation from all relevant members of the community. Then make good on this announcement. The second goal can be achieved only by developing in advance of disciplinary problems an adjudicatory system with sufficient safeguards to meet and surpass current court requirements of "due process."

## II. Developing Rules

Each institution should develop what Otis Singletary calls an "internal system of order."[49] This implies both rules, and a system of adjudicating alleged breaches of those rules.

In developing a set of rules to proscribe activities which may be disruptive of the university's mission, and in developing an adjudicatory system to deal with offenders, several important factors should be kept in mind:

A. *Both systems must be tied to the special character of the institution.* Matters such as whether or not an institu-

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[39] Stamp, *Comment*, 45 Denver L.J. 663, 665 (1968); *Singletary* 5; *see also N.Y.U.* 1.

[40] Stamp, *Comment*, 45 Denver L.J. 663, 665 (1968); *see also Singletary* 5.

[41] *N.Y.U.* 1.

[42] *Singletary* 5.

[43] *Missouri* 137-41.

[44] *See, e.g., Knight* 179; *Missouri* 136; *cf. Esteban* II 629; *Barker* 235. *See also* Chronicle of Higher Education, June 10, 1968, at 1, col. 1; *Woods v. Wright*, 334 F.2d 369, 374-75 (5th Cir. 1964); *Madera*.

[45] Chronicle of Higher Education, June 10, 1968, at 3, col. 1; *id.*, July 14, 1969, at 8, col. 1; *id.*, Aug. 11, 1969, at 1, cols. 1 & 2, and at 2, cols. 1-2 & 3; Wentworth, *Colleges Facing Test on Justice*, Washington Post, Sept. 7, 1969, at B1, col. 5.

[46] Wentworth, *supra* note 45, at B1, col. 5; Chronicle of Higher Education, July 14, 1969, at 4, cols. 1-2.

[47] *Goldberg*, 248 Cal. App. 2d at 874, 879, 885-86, 57 Cal. Rptr. at 468, 472, 476; *Barker* 235; *Esteban* II 629; *Monypenny* 658-59.

[48] *Barker* 234-35; *A.B.A.* 25; *Monypenny* 658-59.

[49] *Singletary* 5.

tion has fraternities, dormitories, and substantial numbers of commuting students and auto traffic; whether it is located in an urban or a rural setting, and whether it tends to be liberal or conservative in character should all enter into the development of rules governing institutional life, and – to a lesser extent – the system of adjudication. Uncritically adopting a successful system developed by another institution is not always wise because institutions vary widely in character. An excellent "general" model may be totally inapplicable at an institution whose character is totally different.[50]

Because almost every institution already has some rules and regulations governing student life, the existing rules might be the best place to start. If these rules are too antiquated, dispose of them entirely and begin anew by asking the question, "what type of negative behavior is so damaging to the mission of the university that it must be proscribed, and what positive regulations should be laid down to assist this institution in accomplishing its educational task?" This sets off what I call the "Grand Debate" concerning the amount of control over the life of its students an institution should – or wishes to – exercise. This Debate should occur every two or three years (if it is not continuing), so that institutional regulations are always in step with contemporary norms.

Naturally, there will be some differences of opinion between administration, faculty and students concerning these rules. In such cases the best compromise between all parties should be sought. The pressing issues of the moment (*e.g.*, "off-campus" speakers, orderly protest, campus recruiters) should always find a place in these discussions and the resulting regulations.[51]

B. *All members of the community who are involved in a particular sphere of activity should be involved in the rule-making governing that activity.* * For example, campus police should be involved in drafting traffic codes, fraternity and sorority advisors may be involved in developing rules governing fraternity and sorority behavior, and school alumni might reasonably be involved in drafting rules affecting general campus conduct. Of course, students, faculty, and administrative personnel would be involved in all areas of rule-making, in substantially greater numbers than the members of the community previously mentioned, *provided* they have an *identifiable interest* in the area being studied, based on *personal involvement* (faculty commuter) or the *nature of their position* (fraternity advisor). Students should be involved in every area of rule-making which governs their behavior because they are more likely to comply with, and join in the enforcement of, rules which they have had some hand in drafting.[52] In addition, the great majority of them are just as strict as any adult in proscribing marginal behavior.[53]

The rules so devised should be reasonably precise, but not overly precise. Because they are not criminal statutes, they do not have to withstand the severe court test of "vagueness" which is applied to criminal statutes.[54] The rules need only identify the behavior to be avoided with comprehensible precision. A little flexibility in the drafting of these rules will allow the adjudicatory system to deal with alleged offenders in a more flexible manner and curtail punishment avoidance based on narrow technicalities.[55]

The rules should be collected, published,[56] and distributed to the student immediately prior to, or upon, his first entry into university life. These rules should also be alluded to in standard university publications such as catalogs, handbooks (if not contained therein), and brochures.[57] Because the student's respect or disrespect for campus authority is established early in his university career, it is desirable for him to begin with a feeling of fairness – but firmness.[58]

C. *In drafting student rules and regulations, the university is really deciding – in cooperation with its students and other interested parties – just how deeply it intends to become involved in the life of its students and just how closely it intends to regulate that life.* In reaching that decision, and in institutionalizing it in printed rules and regulations, there are several common sense principles which the academy should adhere to rather closely.

1. The university should not attempt to wield authority where it is incapable of doing so,[59] or where the wielding of such authority bears little relationship to the educational goals of the institution.[60] (One of these goals is, however, to maintain peace and order on the campus.) In this sense the reasonableness or unreasonableness of a particular form of student activity must be judged in relation to the overall academic function of the university.[61]

2. Although student opinion may be solicited and considered in academic matters such as testing, grading,

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[50] An example of a good general model may be found in the student handbook of Illinois State University, *Student Life . . . ISU*, chs. 1, 2, 8 (1967).

[51] *N.Y.U.* 26; *Singletary* 7, 9-12.

**Author's Note:* Rule-making must meet due process standards too. However, the due process involved in rule-making is *substantive* due process not *procedural* due process–which is the theme of this paper. A brief description of *substantive* due process, and the due process standards to be observed in rule-making may be found in the *Author's Note*, p. iv of the Preface *supra*.

[52] *Singletary* 7.

[53] An instructive student commentary is found in *Comment*, 45 Denver L.J. 620 (1968).

[54] The courts which have considered the issue are uniform in declaring that student disciplinary hearings are not "criminal" or "semi-criminal" in nature. *Goldberg*, 248 Cal. App. 2d at 885-86, 57 Cal. Rptr. at 476; *Wasson* 812; *Missouri* 142, 146; *Barker* 237; *Esteban* II 628; *Van Alstyne* 592-93 & nn. 23 & 24.

[55] *N.Y.U.* 23; *see also Singletary* 9-14.

[56] *Singletary* 9-10.

[57] For a sample statement, see page 28, *infra*.

[58] *Singletary* 9-10.

[59] *Cf. Singletary* 13 and *N.Y.U.* 22.

[60] *N.Y.U.* 7.

[61] *N.Y.U.* 16-17; *Singletary* 13.

ranking, examining, curriculum, and tenure, these are matters which require technical expertise beyond that normally possessed by students and are, therefore, reasonably (and legally) the exclusive jurisdiction of the trustees, president, and faculty.[62]

3. Students' activities away from the university proper, which are not undertaken in the guise of a university agent or representative, and which do not pose a serious threat to the welfare of the school or students under its control, are better left to public authorities.[63] Activities which occur *on* campus, but which involve a much more serious public interest than educational interest, might better be left to public authority as well.[64]

When student activity causing injury takes place away from university property, and where it does not impinge upon the educational mission of the university, it is best prosecuted by those who are actually injured. The university is not, cannot be, and should not be expected to be, the watchdog of the students' activities for the entire community. On the other hand, the university should not abdicate responsibility to public authority for events *which occur on its campus or under its aegis* and which are injurious to the educational process, its property or personnel, students under its control, or the general public.

4. Unnecessary complicity with public authorities may lead to suspicion and antagonism between the students and the institution.[65] This is particularly true when the institution has notice that a particular proscribed activity is taking place on campus, but gives the student no disciplinary warning before notifying public authorities. This is not to say, however, that the university always has a choice regarding the entry of civil authority onto the campus, or that it should act as a buffer between the student and civil authorities. Nothing creates public antagonism so quickly as the appearance that the institution treats its students as if they were above the law.[66]

5. In setting up any system of rules or adjudication, the fundamental "rights" of the student may not be *unreasonably* infringed. He does not, nor can he be required to, sacrifice his Constitutional rights as a condition of entering, or continuing at, the university.[67] Neither can his rights be *unreasonably* restricted by the rules and regulations adopted by the university.* Nor can they be ignored in the operation of the university's hearing system.[68]

It should be remembered, however, that many students are accustomed to finding "rights" where no *Constitutionally protected* rights exist, and are used to thinking of freedom in absolute terms.

In point of fact no one has absolute freedom.[69] Each person's right to absolute freedom is curtailed to the extent that freedom is given to any other person. That is to say that any freedom given to one person is implicitly lost to another.[70] The only issue to be resolved is whether the limitations which the institution seeks to place on its students' freedom are *reasonable.*[71]

This concept (reasonableness) lies in a narrow territory between the students' Constitutionally protected rights on one hand, and the academy's interest in the peaceful pursuit of its legitimate mission on the other. It seems safe to say, nevertheless, that a code of conduct which is broadly devised and subscribed to by the entire university community; which proscribes only that conduct which is seriously harmful to persons, property, and order within the university, and which guarantees to the accused students the due process safeguards prescribed in the following sections of this paper, will probably not unreasonably limit students' "rights."

## III. The Community Approach To Rule Enforcement

The limited regulations resulting from the rule-making process described above should be easy to enforce – if they have been carefully developed, if they reflect the thinking of the entire academic community, and if they are broadly publicized and accepted. Each member of the community should share a common interest in personally upholding these rules and participating in their enforcement.

In this not-so-perfect world, however, self-control and community enforcement may not always prevail. To protect against this contingency, a system of adjudication must be developed to deal with offenders. This system must

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[62] *See, e.g., Wright v. Tex. S. Univ.*, 392 F.2d 728, 729 (5th Cir. 1968); *see also West v. Trustees of Miami Univ.*, 41 Ohio App. 367, 181 N.E. 144 (1931); *Collins v. City of Boston*, 338 Mass. 704, 157 N.E.2d 399 (1959); *Edde v. Columbia Univ.*, 8 Misc. 2d 795, 168 N.Y.S.2d 643 (Sup. Ct. 1957); *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 116 N.W. 294 (1908); *see also N.Y.U.* 22.

[63] *N.Y.U.* 16; *Singletary* 13.

[64] *N.Y.U.* 16-17; *Singletary* 13.

[65] Wilson, *Campus Freedom and Order*, 45 Denver L.J. 502, 507 (1968).

[66] *Singletary* 13.

[67] *See* p. 2 & note 7 *supra*; Beaney, *Students, Higher Education, and the Law*, 45 Denver L.J. 511, 516, 517-18 (1968).

**Author's Note:* Fairly good, and fairly comprehensive discussions of students' "rights" and responsibilities may be found in American Association of University Professors, *Joint Statement on Rights and Freedoms of Students* (1965); American Association of State Colleges and Universities, *Student Freedoms and Responsibilities* (1969); *N.Y.U.* 9-24; *A.B.A.* 12-24.

[68] Lucas, *Comment*, 45 Denver L.J. 622, 628 (1968); *Singletary* 8.

[69] Haskell, *Some Thoughts About Our Law Schools*, 56 Geo. L.J. 897, 898 (1968).

[70] *Id.*

[71] Lucas, *Comment*, 45 Denver L.J. 622, 628 (1968); *Singletary* 8; *see also Missouri* 143, 145-48.

quickly and fairly deal with accused offenders and at the same time insure that normal due process standards are met.

Once the rules and the adjudicatory system are in existence, the university should announce to the campus community and the general public that it has developed a code of conduct and a system of adjudication in which it believes, and that it intends, in the future, to handle internal disciplinary problems internally;[72] unless, of course, they become so aggravated that civil authority is forced to intervene in order to keep peace.[73]

In this process of internal management, however, neither the dean's office nor the campus security force should be viewed – or behave – as the campus "police force." The system is workable only if all members of the community – especially the students – voluntarily play a role in upholding the rules which they have helped to develop.[74] This would imply that a small group of students, and possibly faculty and administrators as well, should be selected to represent the university's interest before the hearing boards.

## IV. The Public Approach To Rule Enforcement

Courts of law have traditionally taken a hands-off approach to the internal disciplinary problems of the academy.[75] They have generally felt that they had neither the expertise nor the responsibility to manage the university's internal affairs.[76]

The courts *have* been willing to intervene, however, when it appeared that the institution *acted arbitrarily, failed to provide adequate procedural safeguards* (due process), or *acted unequally* in dealing with student disciplinary matters.[77] If universities act justly in these matters, they have little to fear from the courts.[78]

"But apart from what the courts might or might not do, there are sound educational reasons for establishing explicit institutional standards for guaranteeing that fairness and impartiality enter into all regulatory phases of the relationships between the student and the institution."[79] The academy has traditionally stood for free and open inquiry, the untrammelled search for truth, and conclusions based on fact. It should seek no less in matters of student discipline.[80]

In fact, it has been suggested that university actions which "unreasonably" restrict student freedoms are actually beyond the scope of the university's authority, because these actions could not conceivably be pursuant to the university's legitimate educational mission.[81]

Obviously the courts are entering the educational sphere only because the academy has failed to keep order in its own house, or because – in keeping order – it has violated certain protected rights of its students.[82]

Not all consequences of judicial review are harmful to the academy, however. "Arbitrariness is not unknown in the most elite intellectual circles. . . .Operating under pressure, as administrators do much of the time, they can be insensitive to the most rudimentary forms of justice and fair play [and] . . . some faculty members are not immune to the temptation of playing favorites."[84]

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[72] *Singletary* 4-5.

[73] Wilson, *Campus Freedom and Order*, 45 Denver L.J. 502, 507 (1968).

[74] *Singletary* 6; *A.B.A.* 11. The impartiality of the trier of fact is an important feature of a "fair" hearing, and may become something of a problem in a close-knit college community. Nevertheless, it must be strictly observed if the institution is to practice internal order-keeping and still have it be "fair". *Wasson* 813; *A.B.A.* 30. *But cf. Barker*, wherein the offended party in student suspension cases was the college president, who also had the right to approve the findings and recommendations of the hearing committee. *See also Goldberg*, 248 Cal. App. 2d at 883, 57 Cal. Rptr. at 475. Obviously, there should be conscious avoidance of any party likely to bring complaints (*e.g.*, Dean of Men) also becoming trier of fact.

[75] *Singletary* 15; *Georgia* 7-8; *Monypenny* 653; Beaney, *Students, Higher Education, and the Law*, 45 Denver L.J. 511, 512 (1968). The wording of myriad judicial decisions also supports this conclusion. *See, e.g., Barker* 235; *Knight* 179; *Missouri* 136; *Esteban* II 629; *Madera* 788-89; *Woods v. Wright*, 334 F.2d 369, 374-75 (5th Cir. 1964). The latter two cases involve minors attending public schools, but the principle is the same.

[76] ". . . the judiciary must exercise restraint in questioning the wisdom of specific rules or the manner of their application, since such matters are ordinarily the prerogative of school administrators rather than the courts." *Barker* 235. *See also Missouri* 136; *Georgia* 7-8; *Perkins* 3.

[77] *Dixon* 157; *Missouri* 136; *Barker* 235; *Knight* 179; *Esteban* II 631.

[78] *Singletary* 15-16; *Missouri* 136; *Dixon* 159.

[79] *Singletary* 16; *see also N.Y.U.* 8.

[80] *Singletary* 16; *N.Y.U.* 8.

[81] *Missouri* 145-46; *Georgia* 6.

[82] *Perkins* 9-10; Chronicle of Higher Education, June 10, 1968, at 1, col. 1.

[83] *Perkins* 6.

[84] *See* p. 2 & note 5 *supra*; *N.Y.U.* 7.

# DEVELOPING A CAMPUS ADJUDICATORY SYSTEM

## I. General Considerations

Whatever the courts and legislatures might or might not do, it is desirable for the academy to design its own internal adjudicatory system, aimed at dealing promptly with internal disciplinary problems, but guaranteeing at the same time "fair play"[84] and "the rudiments of 'due process' to the student accused."[85] This system should be called into use whenever it is necessary to review an alleged violation of the student codes; that is, whenever "student misconduct [has] distinctly and adversely affect[ed] the university's pursuit of its recognized educational purposes."[86]

This is *not* to say that *every* violation of campus rules must be referred to a hearing board. The type of "due process" provided by an adjudicatory hearing is necessary only in the relatively few cases when there is a dispute concerning the guilt of the accused party or the appropriateness of his punishment. In such cases it would be ludicrous for the accuser to determine the guilt of the accused and to set his penalty. In such circumstances, both the accuser and the accused are protected by the intervention of a fair and impartial hearing system which can hear and consider both sides of the dispute before rendering judgment and prescribing a penalty.

Whenever the student accused faces severe penalties, however, it is always advisable to proceed through the hearing process. If the accused wishes to acknowledge his guilt and waive a hearing, he should be required to sign a written statement to that effect.[87] It should contain a rather detailed statement of the wrongdoing complained of, a clear indication that the accused was aware of his right to a hearing, which he specifically waives, and a precise statement of the punishment which he accepts in acknowledging his guilt.

The adjudicatory part of the disciplinary system should be tied to the special character of the institution in the same way that the codes and regulations are. Indeed, once the university community has isolated the areas of institutional life which it intends to regulate,[88] it has already gone a long way toward describing the type of hearing system which it will need to enforce those codes, and the type of violations and the nature of the sanctions which will be assigned to each board. The same committees which were developed from the community to draft codes governing various areas of institutional concern might also be charged with the responsibility of devising an appropriate hearing system to deal with violations of those codes.

Of course, the mere development of an adjudicatory system will invite criticism from some students opposed to all forms of authority or regulation.[89] Indeed, some students may even devise "test" cases to "try" the new system. This is just the type of activity that the system was developed to cope with, however, and, through adequate hearing practices, keep out of the courts. If the system of adjudication is carefully drawn up, with full and free community participation and close attention to "due process" requirements, it should be relatively impervious to the attacks of a displeased minority.

It should always be remembered that a university adjudicatory system is *not* a court of law,[90] and is *not "criminal"* in nature.[91] For this reason terminology related to the legal court system (including the use of the word "court") should be avoided. Also to be avoided are criminal law concepts such as "trial," "guilt," "punishment," "double-jeopardy," and "self-incrimination."[92] The process of fact-finding at the institutional level is one of "adjudication," akin to an administrative proceeding.[93] Consequently, words such as "adjudication," "hearing boards," "hearing," "alleged violator," "violation," "codes," and "sanctions" are much more appropriate to the nature and gravity of the system.

## II. The Hearing Boards Themselves

### A. *Special Considerations:*

1. *As stated before, the special character of the institution should be reflected in its hearing board system.* A complex system for a large and diversified university might include separate hearing boards for fraternities, sororities, various dormitories, and automobile traffic, as well as a general campus hearing board and a board of final appeal. Schools which are smaller or less complex should use only those features of the system which apply to their situation. No institution should hesitate to develop regulations and hearing boards to govern areas of activity which are peculiar to their community.

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[85] *Dixon*, 159; *see also Singletary* 8.

[86] *N.Y.U.* 7.

[87] *Georgia* 25.

[88] *See* pp. 7-9 *supra.*

[89] *N.Y.U.* 3.

[90] *Dixon* 159; *Esteban* II 629; *Singletary* 8.

[91] "The disciplinary measures . . . can by no stretch of the imagination be classified as criminal proceedings." *Goldberg*, 248 Cal. App. 2d at 885-86, 57 Cal. Rptr. at 476; *accord, Missouri* 142; *Esteban* II 628; *Wasson* 812; *Barker* 237. *See also Georgia* 1-2, 11, 13, 25.

[92] *Georgia* 1-2, 11, 13, 25.

[93] *N.Y.U.* 26-30.

2. *It is important that the hearing system be a working one and not a mere sham to take heat off the administration.* Consequently, students should be well represented on all hearing boards. The approved procedures for each board should contain appropriate "due process" safeguards, and there should be a system of appeal.

3. *The jurisdiction of each hearing board should be carefully spelled out and related to those sections of the code which it was designed to enforce.* The sanctions available to each hearing board should be carefully drawn up and should be appropriate in nature and gravity to the proscribed activities reviewed by each board.[94]

4. *The sanctions should never be demeaning or harassing, and maximum sanctions (suspension/expulsion) should be subject to some administrative concurrence.* Academic sanctions should not be imposed for proscribed activities which are non-academic in nature.

5. *Wherever possible, the prosecution of a case should be handled by a student.* As stated before, the dean and his staff cannot fulfill their roles as counselors and advisors if they are constantly cast in the roles of "policemen" or "prosecutors." Since wrongful activity has been proscribed by students, and will be judged by students, and since the activities are prohibited in order that the student's education may continue without interruption, the student should take some responsibility for code enforcement. So that the burden – as well as the stigma – of prosecuting all cases will not fall on one student, a panel of prosecutors should be appointed for each court, one of whom will be selected for each case by the complaining party, or by the chairman of the hearing board, whichever seems more advisable. (This suggestion is modified slightly in the case of the General Hearing Board.)

6. *Procedural safeguards should be tailored to fit the various levels of the hearing board system.* This "tailoring" is done according to the seriousness of the misconduct which each hearing board judges, and consequently the severity of the sanctions available to it. In a hearing which might result in expulsion or suspension, the "rudiments of an adversary proceeding" are necessary.[95] "This is not to imply that a full-dress judicial hearing . . . is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out."[96] Nevertheless, "a hearing which gives the board or the administrative authorities of the college an opportunity to hear both sides in *considerable* detail is best suited to protect the rights of all involved."[97]

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[94] An excellent, but not exhaustive, list of sanctions followed by a short list of major proscriptions is found in *N.Y.U.* at 22. "No sanction should be imposed more serious than is clearly appropriate in the circumstances." *N.Y.U.* 22. *See also Singletary* 15.

[95] *Dixon* 159.

[96] *Id.*

[97] *Id.* (emphasis added).

7. *In order to meet procedural "due process" requirements in the most serious cases, the accused should:* (1) receive adequate (5-10 days) *written* notice of the charges against him,[98] the section of the code upon which the charges are based, and the sanctions which may be applied if the charges are proven; (2) receive written notice of the date, time and place of the hearing (this should accompany the charges); (3) be advised of the names of the witnesses who will appear against him and the substance of their testimony; (4) receive a fair hearing before a duly constituted impartial tribunal (usually composed of a cross section of prime interest groups); (5) have the right to present a defense and witnesses in his own behalf, and the right to cross-examine witnesses against him (the prosecutor, naturally, has the same right to cross-examine defense witnesses);[99] and (6) have access to a transcript of the proceedings and the findings of the board.[100] After a full hearing, disciplinary action should be taken only if the charges are supported by *substantial* evidence.[101] Because the proceedings are not criminal in nature, the standard of justice does not have to meet the most severe Constitutional test.[102] "Substantial justice" is adequate to the situation.[103]

8. *The procedural guarantees enumerated above are sufficient to protect the rights of the student and to meet and exceed current legal standards of institutional "due process" even in aggravated situations which involve suspension or expulsion.*[104] *This does not mean that every student – facing lesser sanctions – is entitled to the same due process procedures.* A scaling down of the procedures listed above, to fit the lower procedural requirements of less aggravated offenses (and lighter sanctions) is what is meant by *due* process.[105]

9. *A jury is a luxury, and a troublesome one.* Because a jury is in no way *guaranteed* as a "due process" safeguard unless the proceedings are criminal,[106] a jury is better left out.

10. *The accused wrongdoer may be assisted in his defense, and represented at the hearing, by an advisor of his*

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[98] *Cf. Wright v. Tex. S. Univ.*, 392 F.2d 728 (5th Cir. 1968).

[99] Although the court in *Dixon* rejects the cross-examination of witnesses as unnecessary (at 159), it is a desirable feature of more serious hearings *if* it can be carried out in a reasonable manner, which can be controlled by the hearing board.

[100] *See, e.g., Missouri* 147-48; *Dixon* 159; *Singletary* 9; *N.Y.U.* 27-29; *Georgia* 24-25.

[101] "Substantial" evidence is clearly the test of sufficiency, not "preponderance of the evidence" or "beyond a reasonable doubt," or any other test common to legal adjudication. *Missouri* 147-48; *Esteban* II 630-31; *A.B.A.* 31.

[102] *Missouri* 147-48; *Georgia* 25.

[103] *See* note 101 *supra.*

[104] *See, e.g., Dixon* 159.

[105] *Missouri* 147-48; *Georgia* 24-25.

[106] *Georgia* 25.

*choice. It is suggested that legal counsel not be used – indeed, not be permitted – on either side of a student-institutional hearing.*[107] The Constitutional right to legal counsel applies only to criminal cases.[108] Although major court cases have never required legal counsel in order to meet "due process" requirements in student disciplinary proceedings,[109] it is in the peculiar nature of the idea of "dueness" that legal counsel might be required in "rare and exceptional circumstances."[110] Circumstances of this description are not likely to obtain, however, unless the penalty threatened is at least as aggravated as expulsion,[111] or unless the courts alter their present position sufficiently to find that obtaining a bachelor's degree is *in fact* a property interest of any student in a public university.[112] In any event, the "rare and exceptional circumstances" which might require legal counsel as a prerequisite of due process would not seem to arise if the *maximum* penalty for any misbehavior was *suspension* (see my recommendations, pp. 17-18 *infra.*)

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[107] *Georgia* 14 & n. 38; *Dixon* 159; *Missouri* 147.

[108] U.S. Const. amend. VI.

[109] Some cases have specifically suggested that legal counsel is *not* required in student discipline cases. "I have been cited to no decision by the Supreme Court or any other court expressly extending the right of counsel to a student at a school disciplinary hearing and my own extensive research has failed to reveal one." *Barker* 237; *accord*, *Wasson* 812; *Dixon* 158-59 (by *implication*). *Georgia* at 14 distinguishes the right of juveniles to legal counsel where they may be committed to an institution. *See also* the discussion in *Madera* 780, 786-89. *Cf. Missouri* 147-48, which states that "legal representation" is *not* a "*general requirement*" of "procedural due process in student disciplinary cases," but that it may be necessary to "guarantee . . . fundamental concepts of fair play" in "*[r]are* and *exceptional circumstances.*" (emphasis added).

[110] *Cf.* "[N]o court has declared that student disciplinary cases can in any way be held to be criminal proceedings and therefore the *right* to counsel is not inherent in the due process *requirements* for such cases." *Georgia* 14 (emphasis added). "It should be pointed out that in most court cases involving student disciplinary proceedings, the students have been given the right to counsel." *Id.* An example is *Goldberg*. This does not mean, however, that procedural "due process" requirements would not have been met if this so-called "right" were denied. Indeed, several courts have enumerated procedural "due process" requirements specifically excluding legal counsel. *Dixon* 159; *Barker* 236-37; *Wasson* 811-12; *Missouri* 147; *accord Missouri* 148 (excluding legal counsel in all but the most "[r]are and exceptional circumstances"). Because all these cases involved the most extreme sanctions – suspension and expulsion – it is hard to imagine just what "[r]are and exceptional circumstances" were contemplated by the court, other than to reserve this possibility for a truly unusual case. It would be wise for the institution to reserve the same power – to authorize the use of legal counsel in unusual cases – upon the majority, or two-thirds, vote of the institutional hearing board charged with hearing suspension and expulsion cases. From all of the decisions studied, however, it may properly be inferred that the "right" to legal counsel is not a "due process" *requirement* in the average suspension or expulsion case. In a highly unusual case (*e.g.*, when a violent felony is the predicate for suspension or expulsion; that is, where the hearing board's conclusions may reach beyond the institution) the "right" to legal counsel may be a desirable addition to other "due process" safeguards.

[111] *Dixon* 158-59; *Barker* 237; *Wasson* 812. These all involved suspension or expulsion, and yet the courts did not stipulate that legal counsel was a necessary "due process" guarantee. *See also* note 110 *supra.*

[112] See pp. 2-3 & note 9 *supra.*

The case against having legal counsel advising either side *during the conduct of the hearing* is quite simple. Their presence would "escalate" the nature of the proceedings to something approximating a legal "trial." A good adversary might employ legal technicalities and courtroom histrionics in such a way that he would engulf the whole proceeding in procedural and semantic problems far beyond the comprehension of any lay participant. Because the hearing is being conducted in a community tribunal and not a court of law, the speedy and "informal" – albeit fair – characteristics associated with community proceedings are to be vastly preferred to a formal legal atmosphere. I cannot stress too strongly that a spirit of informality, concern, and fair play should characterize every level of a university hearing board system. This system is not intended for legal adversaries "battling it out" in a court of law, but for members of the same educational community, trying to decide what is best for the accused student and for the community. Trained and paid attorneys would add little to this process.[113]

Naturally, the prohibition against being represented, or advised, by legal counsel applies only to the actual conduct of the hearing itself. It does not restrict in any way the student's "right" to legal counsel and legal representation *outside* the hearing room.[114]

This does not mean that the accused must face his accusers alone. Definite provisions should be made for him to be represented during the course of the hearing by any person of his choice, such as a classmate, friend, parent, or member of the university faculty or staff – as long as it is *not* a lawyer, law school graduate, law school student, or other legally trained person.

It is probably desirable, in fact, to provide for a small bipartisan cadre of faculty, administrative and student volunteers to serve as counselors to any student who needs assistance.

11. *Because the right to appeal is not guaranteed by the Constitution,*[115] *it does not have to be provided. The so-called "right" to appeal is so much a part of the American tradition, however, that most authors*[116] –

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[113] *Cf. Esteban* I, wherein the court said that the "plaintiffs shall be *permitted* to have counsel present with them at the hearing to *advise* them" (at 651) and "plaintiffs shall be *permitted* to hear the evidence presented against them, and plaintiffs (*not their attorney*) may question *at the hearing* any witness who gives evidence against them" (at 652) (emphasis added). It is instructive that this furthest judicial extension of the "right" to counsel *preceded* the *Missouri* decision, and that the hard position concerning counsel taken by the court in the first *Esteban* decision is utterly absent from the language of the court in the subsequent decision. It is also interesting to note that the counsel was permitted to "advise," not to "represent," the plaintiffs, and was specifically denied the right to cross-examine the witnesses "at the hearing" (not outside of it). Even in the liberal allowance of counsel contemplated in the first *Esteban* case, the court seemed aware that the presence and unrestrained activity of counsel might be harmful to the informal nature of disciplinary proceedings. *See Dixon* 159; *Barker* 237.

[114] More than a "reasonable" restriction on the "right" to counsel might be improper. U.S. Const. amend. VI.

[115] Indeed, the appeals process is not discussed at all in the U.S. Constitution.

[116] *N.Y.U.* 29-30; *Georgia* 25.

*although not most courts*[117] *– recommend that a system of appeal be present.**

The "right" of appeal does not entitle a student to a full rehearing of his entire case. Rather, the appeal board should limit its review of the hearing board's record to three issues: (1) did the hearing board conduct itself in such a way that the accused had an adequate opportunity to prepare and present his defense? (*i.e.*, did he receive "*due* process"?); (2) was the evidence presented at the hearing "substantial" enough[118] to justify a decision against the student; and (3) was the sanction imposed in keeping with the gravity of the wrongdoing?[119] The matter should not even come to the appeal board unless the accused presents the board with a written complaint touching on one or more of the issues mentioned above. The appeal board should limit its inquiry to the issue, or issues, put forward in that complaint. The appeal board may – in its discretion – ask both sides to make an oral presentation.

The appeal board may accept the report and decision of the hearing board, reverse the hearing board's decision and return the case to that board for further hearings in keeping with suggestions that the appeal board may make, or reverse the hearing board's decision and dismiss the case. They may also accept the decision of the hearing board, but reduce the sanction imposed. They may *not* increase the sanction. Returning the case to the hearing board is not *double jeopardy* since the first hearing is still not complete.

If the appeal board accepts the report of the hearing board (whether it lowers the sanction or not), the matter is deemed final; except that either party may petition the original hearing board to reopen the matter upon the discovery of new evidence. The hearing board will judge the sufficiency of the new evidence, and no appeal can be taken from their decision.[120]

12. *Each court should be given the power to govern its own internal proceedings, and to set "reasonable" rules to this end* so long as they proceed along lines of "fundamental fairness" to both parties. The power to govern internal proceedings includes the power to exclude disruptive persons from the hearing, and to recess and reconvene the hearing as seems necessary.

13. *The campus adjudicatory system is not intended – and should not attempt – to operate in place of civil authority.* A student who is liable for a violation of civil law should not receive special consideration simply because he is a student. To do so would "[promote] disrespect for the law . . . and [tend] to create the erroneous impression that the campus [is] a sanctuary for law breakers. In his role as 'citizen' the student is subject to the civil law just as he is subject to the codes of the academy in his role as 'student.' "[121]

B. *"Due Process" Revisited.*

As has been previously noted, the "process" available to the accused in any hearing board should be tailored to the severity of the offense alleged, and, consequently, the penalty faced. "Due process" safeguards should be built into the adjudicatory processes of every hearing board so that both the accused and the institution are assured that "due process" requirements will be met, regardless of the campus situation at the time of the proscribed activity, accusation, and hearing. The institution seldom *intends* to deny "due process," but occasionally may do so under the pressure of events.

Due process is really required in *every* situation in which a student is accused of a wrongful act and stands to serve a penalty therefor. The accuser – whether he be faculty, administrator, or fellow student – should always stand ready to prove his allegations – by third-party evidence, if possible. Hasty and arbitrary actions on the part of an accusing faculty member, administrator, or student, are just as suspect as the actions of the accused. Whenever a hearing board is constantly invited to make unsavory choices between the "word" of the accuser and that of the accused, unhealthy suspicion will unavoidably arise regarding the "dueness" of the hearing process.

Nor should the faculty member or administrator mete out punishment before the protesting accused has had an opportunity to be heard. Where this is done, the ends of "due process" are completely frustrated.

There is one exception to this rule. That is in a situation which is so out of control that a certain measure of authority must be asserted to bring back equilibrium so that facts may be collected and hearings conducted. To this end, a certain amount of force may be exerted, *in increasing amounts, over a reasonable period of time.* Such force should preferably *not* be physical. It may begin with a stern warning, or an invitation to draft a list of complaints and choose a leader so that negotiations may start; move to a court injunction or campus curfew; and finally reach the point of police intervention.

Any action taken by the administration which is not clearly necessary, adequately announced (immediately prior to its being taken), and concurred in by appropriate representatives of the faculty and student body (unless the immediate nature of the situation makes this impossible) only serves to "escalate" the confrontation.

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[117] In some of the leading court cases the suggestion that there be a system of appeal is notable for its absence. *See, e.g., Dixon* 159; *Barker* 236-38; *Esteban* I 651-52; *Esteban* II 628-631.

**Author's Note:* I concur.

[118] "Substantial" evidence is the test. *See* note 101 *supra*. If "reasonable" persons could differ concerning the substantiality of the evidence, the appeals board would have to find that the evidence was *too insubstantial* to support a finding against the student in order to reverse the hearing board. That is – on appeal – the presumption is in favor of the hearing board's finding being supported by "substantial evidence".

[119] *N.Y.U.* 22, 29.

[120] *N.Y.U.* 29-30.

[121] *Singletary* 13-14; *see also N.Y.U.* 16.

Whatever action is taken should result in as little loss of face to both sides as possible. These emergency actions should never be tantamount to deciding the guilt (punishment), or innocence (amnesty), of the parties involved prior to a full hearing of the facts in an atmosphere conducive to that purpose. To permit less would be a denial of due process – which can only take place in a situation free from excitement and coercion.

The president or his proximate delegates have the authority to summarily suspend and remove a student. This authority should never be exercised unless genuinely needed, however, because it denies any due process whatever. Therefore, the term of the suspension and removal should never survive the threat it was meant to forestall. It should always be treated as temporary, and should always be followed by a full disciplinary hearing. No action was more tailor-made for court litigation than a terminal dismissal in the heat of crisis without due process protections.[122]

The sole exception to the temporary nature of the suspension is a situation in which there is *substantial* reason to fear harm to persons or property if the accused were allowed to return to campus prior to his hearing. The mere fact that he is "expected" to precipitate more violence is not sufficient.

I have lumped together summary suspension and removal because I believe that a matter which is not serious enough to warrant physical removal from campus is not likely to be serious enough to justify summary suspension.

Most frequently, students caught in a violation of campus codes will acknowledge their own guilt. Their situation will require no more due process than to realize that (1) their confession is not required; (2) a system exists for the speedy hearing of their case and a determination of their guilt or innocence if they request it; and (3) the penalty suffered will be no greater if they insist upon a hearing than if they do not.[123]

In fact, only a small percentage of the students caught in wrongful conduct at all levels of aggravation demand a hearing. Most of these demands arise, however, in the more serious and more ambiguous cases – the very cases which one *must* adjudicate to avoid the charge of being arbitrary or denying "due process."

It is possible, of course, that an occasional student will take advantage of the system, and demand a hearing on even the most minor and well-documented violation. This is the price the university will have to pay for a system which will act just as frequently to protect them from massive law suits and considerable adverse publicity. The time lost in hearing minor complaints is negligible, however, because the process is much more streamlined.

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[122] This citation is, roughly, the *Dixon* case.

[123] To create a greater penalty for a student who demands a hearing conditions his "right" to a fair and impartial adjudication of the facts on his willingness to risk a greater penalty if he loses. This infringes upon both his right to due process and his guarantee of equal protection under the Constitution. U.S. Const. amends. V & VII, §1, respectively. *Cf. Missouri* 146-47; *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

C. *A Sample Hearing Board System.*

As mentioned before, a prerequisite to the development of a workable hearing system is the "Grand Debate" concerning the scope and nature of the institution's control over student life and conduct. Once these conclusions are drawn, and the size, nature and complexity of the institution is taken into account, it is relatively easy to develop a hearing structure, adequate "due process" safeguards and appropriate sanctions. The number and types of hearing boards, and the jurisdiction, processes, and sanctions of each, will be determined largely by the nature, variety and complexity of the codes of conduct which the boards have been created to enforce. The next several pages are devoted to a detailed examination of a sample hearing board system for a large and complex university. Smaller and less complex schools can adopt as much of the sample system as they need. In some schools it is conceivable that one hearing board can handle all adjudication.

1. *Fraternity Hearing Board:*

*Composition* – Four to eight fraternity members elected or appointed in some equitable fashion; representatives from the inter-fraternity council, fraternity advisor's office, and fraternity alumni (if available). All members must be impartially selected or *ex officio.* Some way should be devised to rotate membership to all fraternity chapters on campus. No fraternity should be represented on the board by more than one member.

*Jurisdiction* – Any dispute arising between fraternities; between members of various fraternities acting in their organizational capacities; or between fraternities, or fraternity members, acting in their organizational capacity and the university or general public. (The latter jurisdiction would be concurrent with the campus hearing board and may be preempted by them in appropriate cases.) The civil courts are also available to members of the general public, but an action begun in the civil courts should not preclude punishment *within the system* when damage *to the system* has resulted. (Double jeopardy is not involved. See pp. 21-22 *infra.*) A fraternity member acting alone, and not in his organizational capacity, should be considered in his role as student.

*Sanctions* – From short-term campusing, loss of social privileges, required "volunteer" work, to expulsion from the fraternity house, or suspension or expulsion from the fraternity system (for varying periods of time).

Penalties should never be punitive or demeaning. The court does not have jurisdiction to withdraw fraternity membership, and should require the suspension or expulsion of members from their fraternity dwelling or from the fraternity system only in the most aggravated situations.

*Process* – The usual written notice of 5-10 days, confrontation and cross-examination of witnesses, the opportunity to be advised and represented, and to present witnesses and a defense in one's own behalf, access to a record of the proceedings and the findings of the board.

In cases not involving suspension or expulsion from the fraternity house or system, or other sanctions considered serious within the community, five days notice and signed affidavits of testimony may be substituted for ten days notice, live witnesses and cross-examination. Confrontation and cross-examination of the accusing party or parties should be preserved in all cases.

In the case of individuals, the board may decide to turn the offending member or members over to their respective fraternities for hearing and punishment, reserving only the right to review the adequacy of the sanction imposed. This should not be done where separate fraternity hearings are likely to lead to inconsistent findings of fact or guilt, and/or unequal punishments.

*Appeal* – Right to appeal to the campus hearing board.

2. *Sorority Hearing Board:* The same as the fraternity board in all respects except sanctions. Sororities may consider as serious activities which the rest of the university community does not regard as serious. Hence, their code of conduct and sanctions may reflect these values in a way which differs from the fraternity hearing board. In cases involving minor misconduct and sanctions, the lower degree of process described in the "Fraternity Hearing Board" section on *Process* will suffice.

3. *"Greek" Hearing Board:* A combined fraternity-sorority hearing board sitting on a permanent basis is possible, but not recommended because standards of objectionable behavior and sanctions vary considerably between fraternities and sororities. However, combined meetings of the two boards may be called to hear disputes involving both types of groups.

The two boards acting in concert avoid the necessity of separating into two cases a dispute arising out of a single set of facts, thus preventing a double hearing of the facts which might result in inconsistent verdicts. The sanctions prescribed for separate fraternity and sorority defendants may vary, however, in type and severity. The process described above for major and minor offenses shall apply. The combined boards may have an organizational meeting to develop separate sanctions for the "Greek" board, or simply apply separate board sanctions respectively.

*Appeal* – Right to appeal to the campus hearing board.

4. *Dormitory Hearing Board:* Separate hearing boards should probably be set up for each dormitory, or at least for men's and women's dormitories should dormitories of both descriptions be clustered closely together and treated as a single living unit. It is possible, of course, and it may be necessary in the case of co-ed dormitories, to treat proximate, or integrated, buildings housing both men and women through one co-ed hearing board. This presents the possibility of separate codes of proscribed behavior and, almost unavoidably, separate sanctions for men and women. Workable solutions to this problem are much better devised by persons who live in the situation and have confronted similar problems before.

It is equally possible that extremely large dormitories will develop separate governments and hearing boards for each living floor, or, in the case of separate buildings within the same dormitory complex, a hearing board for each building. Whatever the system of hearing boards devised, it should follow the organization and governmental structure under which the dormitories normally operate.

The code of conduct for each dormitory may be different (so long as it doesn't proscribe the residents' behavior unreasonably, see pp. 2-3, *supra*), but a uniform code is to be preferred, in spite of the fact that several hearing boards may enforce it.

In most respects dormitory hearing boards would behave very much like fraternity and sorority hearing boards -- except that they might not emphasize desired behavior, but punish only offensive behavior.

Other important differences are: (1) there is no lesser disciplinary authority such as a fraternity or sorority chapter to which the dormitory boards could refer cases for disciplinary action (unless there were "floor" governments and hearing boards); and (2) the range of sanctions available to dormitory hearing boards would not be as great as those available to the fraternity and sorority boards because the living relationship is not as personal.

Procedural requirements would be the same in both cases, except that in large and impersonal dormitory structures there is a greater need to have live testimony, even in minor cases. Misbehavior which occurs within a dormitory unit or on its grounds should be referred either to the hearing board of that unit, or the dormitory unit in which the offender resides (usually they will be the same). If the offender is not a dormitory resident, jurisdiction would be concurrent with the campus hearing board (in the case of a student), the fraternity hearing board (in the case of a fraternity man, etc.). When two hearing boards are involved (example above) the hearing board of the unit in or near which the offense occurred will have primary jurisdiction, but should surrender their jurisdiction to the hearing board having normal jurisdiction over the offender, unless they feel that the offender will not receive a fair hearing before that board.

A dormitory resident who performs a wrongful act outside a dormitory and off its grounds, and who is not acting as a dormitory representative, or in concert with other members of the same dormitory, should be treated in his capacity as student. Residents of separate dormitory units acting in concert should be referred to the campus hearing board unless there is an *all-dormitory* hearing board to which they could be referred.

In disputes between the campus or general public and members of a dormitory unit, jurisdiction would be concurrent with the campus hearing board and may be preempted by that board in appropriate cases.

*Appeal* – Right to appeal to the campus hearing board.

5. *Traffic Hearing Board:*[124]

*Nature* – A hearing board to arbitrate grievances between the campus parking authority (police) and persons using campus parking facilities, and to impose sanctions and render judgments (adjusting citations, restricting parking privileges, etc.) which should not be unilaterally made by persons charged with operating, or policing, parking facilities.

*Composition* – Two or three commuting students, representatives from the Student Government and faculty, and *ex officio* members from the dean's staff and campus police force supervisory staff. All but the *ex officio* members should be commuters using university parking facilities. Student commuters should outnumber faculty commuters and administrative representatives.

*Jurisdiction* – All matters having to do with the operation of automobiles on university property, but not as a substitution for *public* authority when it applies. Institutional vehicles may be accorded special privileges outside the jurisdiction of this board.

*Sanctions* – The right to waive and adjust citations for parking or moving violations, and the power to condition, restrict, or deny further use of university parking facilities, based on the gravity or frequency of offenses. The permanent denial of the use of university parking facilities may be unduly harsh depending upon the availability and/or cost of public parking in the vicinity.

Nominal monetary fines are traditional for minor traffic offenses, but more serious violations should not involve steadily higher fines (say beyond $10). Rather, more serious violations should be punished by restricting the student violator's use of university parking facilities.

*Process* – Five days written notice (the citation itself can serve as notice of the offense, the section of the traffic code involved, the sanction faced, and the terms of appeal to the board), opportunity to present the accused's side of the case, and to present witnesses in his own behalf. Cross-examination should not be allowed. The situation is not serious enough to merit it, and it could easily develop "pure" conflicts between the accused and the arresting officer, where the officer is unable to produce witnesses of his own. The court may question both parties at will.

Permitting the accused to be represented and advised by a person of his choice (not a person with legal training) may seem overly generous, but it may be desirable in cases where a frequent or serious offender faces extremely stiff penalties (*e.g.*, no further use of university parking facilities). Because the board would not consult the past record of the accused before deciding his guilt or innocence in the case before them (to avoid a "*presumption* of guilt" based *solely* on his past record), the accused who is an habitual offender may be playing for considerably higher stakes than the board realizes at the time. Consequently, *all* traffic violators would have to be given the option to select an advisor. This may prove a bit cumbersome if many violators exercise the option. If it does, it could be eliminated by lowering the maximum sanction to a level (say, no further use of university parking facilities *for the term*) that could not possibly require representation to fulfill "due process" requirements.

Of course, the board has a right to look at the offender's past record once they have determined his guilt, to set an appropriate sanction, *i.e.*, stiffer sanctions for repeaters.

Some record of the proceeding should be kept, including the name of the policeman and the accused involved, the violation, the decision of the board, the reasons therefor, and the sanction imposed. A record should also be kept of past offenders. The board has a right to look at the latter record once they have determined guilt of the accused in order to set an appropriate sanction.

Reasonable time extensions for the student's inability to appear should be granted.

*Appeal* – The right of appeal is to the campus hearing board.

6. *Campus Hearing Board:*

*Nature* – This is the highest *hearing* board in the university's hearing board system. It serves as the appeal board for all lower boards. Its scope of review on appeal is that described in the section on appeals (see pp. 13-14, *supra*). In addition, the campus hearing board has original jurisdiction over disciplinary matters involving the student as *campus* citizen, including the most severe discipline cases (those involving suspension and expulsion).

*Composition* – This board should draw together in some equitable manner and proportion the same wide variety of community representatives that was reflected on the committee that prepared the campus codes. It should be a *bona fide* cross section of the involved university community. Students, faculty and administrators are a must.

Elective and appointive processes may be variously used to select members of this board. *Ex officio* representatives should be avoided if at all possible, and (for reasons evident from the composition of the appeal board, *infra*) the highest ranking officer in any area of student, faculty or administrative life should be excluded from membership.

This is the one board on which students should *not* outnumber other members, although they should have the largest *proportionate* representation of the various interest groups represented.

Naturally, the members of this board should have some familiarity with the meaning of "due process." This familiarity, however, can be acquired from reading this paper and material recommended in the bibliography. A sophisticated legal understanding is not required. (If accuser and accused are allowed to be represented by legal counsel, however, it would be highly desirable to have an attorney or judge serve as foreman of the hearing.) The rules governing the hearing board should be carefully designed to insure that fundamental requirements of due process are

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[124] The leading case is *Cohen v. Miss. State Univ.*, 256 F. Supp. 594 (D.C. Miss. 1966); *but cf. Risner v. Ariz. Bd. of Regents*, Memorandum Decision No. 104455 (Ariz. Super. Ct. in and for County of Pima 1968).

met even if there is a temporary lapse of knowledge or judgment on the part of the board members.

*Jurisdiction* – The jurisdiction of this board can be just as broad as the university is willing to allow. As stated previously, it has appellate jurisdiction over all lower hearing boards. In addition, it has original jurisdiction over disciplinary matters involving university students in their capacity as students and all other student disciplinary matters not assigned to other hearing boards. The campus hearing board has *concurrent* jurisdiction with other hearing boards when disputes arise between the campus community, or a student thereof, and a person or group normally represented by the other hearing board, *e.g.*, a dispute between a student – not a fraternity or sorority member – and a fraternity. When concurrent jurisdiction exists, the campus hearing board may preempt jurisdiction in serious cases. The campus hearing board has *exclusive original* jurisdiction over all *serious* discipline cases and any seriously contested academic matters for which there is no other duly constituted tribunal. It should hear all cases in which the sanction might be suspension or expulsion, other than academic suspension or dismissal.

*Sanctions*[125] – The most important principles which should guide the board in choosing sanctions are:

1. They should relate to the gravity of the offense;

2. They should relate to the area of activity or circumstances in which the offense occurred (*e.g.*, dormitory, fraternity, parking lot, campus protest);

3. They should be non-academic, *i.e.*, they may include payment of a fine or damages, loss of a privilege, or suspension, but *never* loss of credit for academic work successfully completed, nor loss of library privileges (except perhaps checkout privileges).

Expulsion is *not* recommended as an appropriate sanction. Because an expelled student will face severe difficulties gaining admission to another academy, and the lack of a college education can be a severe handicap to a capable person in our contemporary society, it is questionable whether one act, or a series of acts, no matter how aggravated, should serve as the sole provocation for down-grading a person's potential. Certainly students who willfully and flagrantly violate college rules should be punished. But if, after serving his punishment, the student is going to be readmitted to the academy, why not make his sanction fit that pattern of institutional behavior?

That is, why not make the maximum penalty *suspension* – for a stipulated term, or upon stipulated conditions? If the academy is going to expel a student in one year, reconsider his case several years later, and then readmit him, does the institution "*lose*" anything if the student was originally simply suspended for a term of years? Indeed, they may gain something.

In the field of administrative law, to which the academy's disciplinary practices have been analogized,[126] there is a principle that, until the "available . . . institutional processes have been exhausted, the disciplinary action is not final and the controversy is not ripe for determination."[127] This is known as the doctrine of "ripeness."

Frankly, it cannot be determined from existing case law whether the courts would consider a disciplinary case which had gone through the institution's process of appeal, and on which a firm verdict of suspension-for-a-term had been rendered, "ripe" for judicial review or not.[128] There is some reason to believe from their language that they might not, particularly if suspension-for-a-term becomes an accepted practice.[129] At least, the court would be inclined to relax the standards of "due process" where the long-term damage to the student was less severe.[130]

What *is* certain is that a *terminal* expulsion and *summary* dismissal do immediately meet the *Missouri* test of "ripeness,"[131] and are, therefore, immediately available for court review.[132]

The temporary sanction in student discipline cases may have several advantages over the terminal sanction, because the court may (1) refuse to take jurisdiction because the case is not "ripe," (2) take an extremely liberal view with regard to due process requirements because the sanction does not act as a permanent bar to educational opportunity, (3) declare the case moot if the student gains readmission – or enters another institution – before his case is heard.[133]

Because the "cooling off" period prescribed by the "suspension-term" sanction will usually be sufficient to solve the personal and motivational problems of all but the intellectually deficient (*academic dismissal*) or emotionally disturbed (*suspension-conditional*),[134] it is quite likely that by adopting "suspension-term" and "suspension-conditional" as the *maximum* forms of penalty, even the most serious campus hearing board hearings can be conducted with relatively modest procedures, and never become the target of penetrating court scrutiny.

The university is further protected from court scrutiny when it maintains a well designed adjudicative system, the "due process" safeguards of which are clearly evident. A student-filed civil suit attacking such a system on the grounds that it denied "due process", could reasonably be dismissed after the preliminary pleadings for "failure to state a cause of action."[135]

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[125] An excellent, but sketchy, list of proscribed conduct affecting the university community may be found in *N.Y.U.* at 23-24.

[126] *Georgia* 1-2, 11-12; *see also N.Y.U.* 26-30.

[127] *Missouri* 143-44. The same language appears in *Esteban* II at 628. *See also Monypenny* 653-54; *Georgia* 7-8, 11-12.

[128] See *Missouri* 144; *Georgia* 7.

[129] *Missouri* 141-45; *Esteban* I 628.

[130] See *Missouri* 142; *Knight* 177-79; *Georgia* 7-8 & nn. 14 & 15.

[131] *Missouri* 144.

[132] *Id.*

[133] All of these possibilities exist in the facts of the *Esteban* case, and are fully discussed in the second decision, but with rather inconclusive results. *Esteban* II 624-29.

[134] Whatever "conditions" are set for the return to the campus community of a student in this category, they must be reasonably related to the improvement of his ability to function within that community, and be within his ability to achieve.

[135] Fed. R. Civ. P. 12(b)6.

An excellent list of sanctions may be found in the *New York University* booklet, at page 23. They include (but need not be limited to) "admonition, warning, censure, disciplinary probation, restitution, suspension, and expulsion," in ascending order of gravity.

*Process* – The procedures of the campus hearing board are more complex than those of the other boards. This is necessary to meet the higher standards of "due process" required by the more serious nature of the cases it considers, and the sanctions it may impose. Because it is the more serious sanctions which are most likely to invite court review, these processes – in full use (the most serious cases) – should meet prescribed court tests.[136]

That is *not* to say that the board should allow itself to be trapped into proceeding as if it were a court of law, observing tight procedural rules, permitting legal counsel on both sides, and in every way conducting itself as a formal adversary proceeding. Such a requirement is not prescribed by the courts[137] and, as mentioned earlier, a proceeding of this sort would be absolutely destructive of the sense of "community" and "informality" which should prevail in these hearings.

The procedures set forth at page 12, *supra,* are quite adequate to meet, and exceed, the "due process" requirements prescribed by the courts for the most serious student disciplinary proceedings,[138] and should be adopted as the appropriate procedures for the campus hearing board when it is considering cases which may involve suspension (or expulsion).

It is not required that the campus hearing board apply all of these safeguards when a substantially lower offense, – and sanction (*e.g.*, censure or lower), – is involved. In these situations, five days written notice, a list of witnesses and the "nature" of their testimony, signed affidavits rather than testimony, unavailability of cross-examination, and a hearing before a representative portion of the full board, could be substituted for the related features of the full process and still easily meet "due process" requirements.[139]

*Appeal* – An appeal may be taken from the campus hearing board only in cases heard under its *original* jurisdiction. Hearings of lower boards, *appealed* to the campus hearing board, terminate – at least within the institution – at this level.

7. *Campus Appeal Board:* The campus appeal board hears *only* appeals, and *only* from the campus hearing board. It has no "original" jurisdiction. Because it is the final arbiter in matters of campus discipline, it should be small, extremely high level, detached enough to balance the student's interests against those of the institution, and should be *absolutely* reflective of the three prime sectors of the university community – faculty, students, and administration.

It is also suggested that the members of this board have no constituency – that is, that they all be *ex officio.* The suggested members are: the president of the university or his designate, (it is preferable that the president designate this function to a vice-president, such as for academics or student affairs, etc.), the dean of the college which the student attends, or the chairman of his major department, president or vice-president of the faculty senate, and the president of the student body, who is (conceivably) beyond electioneering. If the president of the student body is an underclassman, the president of the senior class is an appropriate second choice.

The scope of the appeal board's review, and its power to modify the hearing board's decision are the standard review powers set out at pages 13-14, *supra.*[140] Of course, the board has the power to refuse to accept an appeal which it feels lacks merit. Normally, it reviews *only* the record from the hearing board level. In rare circumstances, however, the board may ask for an oral presentation concerning the grounds for appeal, and rebuttal. The decision of the appeal board is final.

*The President* – As a technical matter, the university's charter usually gives power and authority over the educational mission of the institution to a board of trustees or regents.[141] They in turn delegate it to the president of the university, as the highest administrative officer under their control,[142] and he re-delegates it to subordinate officers, faculty, and, increasingly, to students.[143]

Because the ultimate institutional responsibility for the exercise of this power rests with the president, he may see fit to recall his delegation and exercise the power himself in certain rare instances. Technically, therefore, the president *could* have the absolutely final approval (short of the trustees) of any decision reached in any of the hearing or appeal boards.

In fact, he would probably be concerned only with the most unusual and serious cases heard by the campus hearing board and appeal board. But, in a technical sense, the hearing boards do nothing more than "recommend" punish-

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136 *Dixon* 158-59; *Missouri* 147-48; *Esteban* I 651-52.

137 Indeed, "[t]he attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound." *Missouri* 142. "This is not to imply that a full-dress judicial hearing . . . is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out." *Dixon* 159.

138 *Dixon* 155, 158-59; *Missouri* 147-48; *see also Esteban* I 651-52; *cf. Esteban* II 628-31.

139 *Missouri* 147.

140 *Cf. N.Y.U.* 29-30.

141 *Speer v. Colbert*, 200 U.S. 130 (1905); *Young v. Univ. of Kan.*, 87 Kan. 239, 124 Pac. 150 (1912); *In re Royer*, 123 Cal. 614, 56 Pac. 461 (1899).

142 *Stetson Univ. v. Hunt*, 88 Fla. 520, 102 So. 637 (1924).

143 *Dubuque Fire & Marine Ins. Co. v. Union Compress & Warehouse Co.*, 143 F. Supp. 128 (W.D. La. 1956); *see also Barker* 235; *Knight* 178-79; *Goldberg*, 248 Cal. App. 2d at 885-86, 57 Cal. Rptr. at 476; *N.Y.U.* 14-16.

ment to the president, and he, by his failure to intercede, accepts their recommendation.[144] It is suggested that the president leave power and discretion over student disciplinary matters with the hearing and appeal boards in every possible case, exercising his own prerogatives only when it is inescapably necessary to avoid damage to the institution. Even then, the president can only intervene to lessen or waive sentence. He could not increase it without violating the student's right to "due process."

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[144] Because the president of the university has the "power" to intercede, his failure to do so – if he has notice of a plea for his intercession – is tantamount to an affirmative act supporting the finding of the hearing or appeal board. *See generally Barker* 234; *Goldberg*, 248 Cal. App. 2d at 883-85, 57 Cal. Rptr. at 475-76.

# MISCELLANEOUS ISSUES

This section discusses, in no particular order, several issues which surround the "due process" question and are important for university officers to be acquainted with. They have been placed in this section because they could not have been worked into the main text without substantial digressions, or because they were incompletely treated when introduced.

## I. Violation Of A Criminal Or Civil Law

The university hearing system is not set up to enforce the criminal or civil laws of the community in which the university is located.[145] If the university hearing system operates in this manner it is guilty of at least two *severe* indiscretions, if not a violation of law itself.

The first indiscretion would be punishing a student for an act which was not damaging to the university. The authorities are in agreement that a university is a "*special* purpose" community.[146] They further agree that university disciplinary proceedings should be "limited to instances of student misconduct which distinctly and adversely affect the university's pursuit of its recognized educational purposes."[147] This is not to suggest that a student who engages in a wrongful act external to the campus should, for that reason alone, escape any university sanction. But the university must do more than simply punish the student a second time for an act which the civil authorities are already prosecuting.[148] (Indeed, it has been suggested that a university which punished a student for an act which had no reasonable relevance to its educational mission, would be itself in violation of its lawful function.)[149] Where the act complained of "calls into question the student's membership in the educational community," or when "his continued presence would adversely affect the ability of others to pursue their educational goals . . . ," then the university would be perfectly justified in undertaking disciplinary proceedings.[150]

Another indiscretion would be for the university to slavishly follow the results in the criminal or civil proceeding in determining the student's guilt,[151] or consider that the academic community's interests had been damaged simply because the student's actions caused adverse publicity for the institution.[152]

Where the university's name or authority is wrongfully represented, of course, its interests are certainly involved.[153] When a wrongful act occurs on campus, the university is also unavoidably involved.[154]

If, indeed, an activity on the campus gets so out of control that the civil authorities have to enter, it is inconceivable that the university would not have sufficient reason to discipline the students involved, whether civil authorities take court action or not. It should be remembered – and students should be informed – that at a given point in the escalation of a campus disorder the civil authorities *have* to enter the campus – whether they are invited by campus authorities or not – to protect persons, property, and the "peace."[155]

While it is perfectly appropriate for a university to advise a student accused of civil wrong concerning his rights, and to help him obtain counsel,[156] it would be a serious mistake to request special consideration for the student. "Such action promotes disrespect for the law, retards the growth of responsibility, and tends to create the erroneous impression that the campus sees itself as a sanctuary for lawbreakers."[157] Although it is certain that such practices prevailed in the past (with the willing cooperation of civil authorities), it would appear that there is little to be gained from such conduct in the future.

Some schools have on occasion posted bond for a student arrested in a campus or community disturbance. There is nothing wrong with this if the student cannot assist himself and must rely upon the university. To institutionalize this practice, through the establishment of a bail fund, however, would encourage the student to look to the university for this added and gratuitous service. Also, the university would thereby accept a responsibility which it has no business exercising unless there is some indication the student is being mistreated or has no other resource for bail. The university does, however, have a moral obligation to see that its students are treated fairly by civil authorities.

## II. Double Jeopardy

Technically, the principle of double jeopardy is a *criminal law* concept,[158] and because the courts agree that

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[145] *N.Y.U.* 16.

[146] *See* note 39 *supra.*

[147] *N.Y.U.* 7: *see also Georgia* 6; *Singletary* 10; *Missouri* 137-38, 145.

[148] *N.Y.U.* 17; *Georgia* 17.

[149] *Missouri* 145; *see also N.Y.U.* 17.

[150] *N.Y.U.* 17.

[151] *Goldberg* 476; *see also Georgia* 16-17; *N.Y.U.* 17.

[152] *Georgia* 17; *N.Y.U.* 16-17.

[153] *Singletary* 13; *N.Y.U.* 12.

[154] Although the institutional decision to leave the prosecution of such cases *solely* to civil authorities is not impossible. *See Singletary* 12-13; *N.Y.U.* 16-17; p. 9 & note 64 *supra.*

[155] *Singletary* 12.

[156] *Singletary* 13; *N.Y.U.* 17.

[157] *Singletary* 13.

[158] U.S. Const. amend. V.

university disciplinary hearings are *not* criminal proceedings,[159] criminal law principles simply do not apply.

But, even dismissing the civil-criminal technicality, it would be unreasonable to suggest that a wrongful act, committed on or off campus, which violated both university codes and criminal statutes, and damaged private property, could not be punished by all injured parties: the university, the public, and the property owner.[160] The fact that a single act evokes concurrent sanctions does not make it "double jeopardy" nor does it necessarily offend any sense of fair play.[161] What *is* important is that *each* prosecuting party – *especially the university* – be able to identify a way in which it was damaged.[162] The institution should not simply duplicate the punishment meted out by civil authorities.[163] This position is taken, however, because such behavior is bad institutional policy, or beyond the scope of the educational function – *not* because it involves "double jeopardy."[164]

## III. Violent Confrontation

The matter of violent confrontation has been mentioned elsewhere in this paper.[165] In dealing with such confrontations, several items are worth remembering.[166]

(1) The possibility of a confrontation escalating to violence is far less if the faculty and administration have been open and fair in communicating and negotiating with students, but have been *entirely unyielding in the face of coercion, blackmail or physical pressure.* When the only thing to be gained by escalation is sterner discipline, it is not a viable tactic. Students get the opinion that escalation and coercion work because they have worked in the past. Every unwarranted concession spawns less warranted demands.

(2) If violence does erupt, efforts – short of concessions – should be made to defuse it as quickly as possible. Negotiation is not necessarily a concession. Other defusing methods include injunctions and curfews. Because escalation invites extreme positions first on one side and then on the other, great pains should be taken to avoid extreme positions, and to be conciliatory without granting concessions.

(3) Before any control step is taken (*e.g.*, declaring a curfew), abundant prior announcement of the step to be taken and the consequences for non-compliance should be made to participating students. A certain amount of time should be allowed between the announcement of a control step and its enforcement for the gradual wearing away of moderate "sympathizers" as the disciplinary "risk" becomes higher. Finally, only the hard core irreconcilables will be left to deal with. Unannounced or sudden changes in disciplinary tactics catch peaceful bystanders by surprise and evoke more sympathy for the militants.

(4) Police should be called in only as a last resort, usually when there is imminent danger of injury or damage. Police tend to aggravate the situation rather than aid it, because of the fear and disrespect which even educated groups hold for them; because the power imbalance tends to make hero-martyrs of the student dissidents, and because of the awful efficiency with which policemen do their work.

The students should be made to realize, however, that the university does not "*invite*" police onto the campus. At a certain level of danger to persons and property, police are *obligated by law* to respond. It is therefore in the students' interest to keep their protest below that level.[167]

## IV. Self-Incrimination[168]

The Constitutional protection against self-incrimination[169] is another *criminal law* principle which students have attempted to apply to disciplinary hearings.[170] Because disciplinary hearings are *not* criminal in nature, the Constitutional proscription against "self incrimination" does not apply.[171] The courts have supported this position in several celebrated cases,[172] but it is always possible that they may change their position on this issue because of their increasing tendency to protect individual rights and the very private nature of the right.

Because universities have no way to enforce citations for contempt of court, and because it is largely up to the individual whether he will speak or not, it seems impossible for the university to compel self-incrimination anyway. As a consequence, it would seem advisable to add to the students' sense of security by specifically acknowledging that it is a "right" available to students in disciplinary hearings.

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159 *See, e.g., Barker* 237; *Missouri* 142; *Esteban* II 628; *Goldberg*, 248 Cal. App. 2d at 885-86, 57 Cal. Rptr. at 476; *A.B.A.* 29.

160 *N.Y.U.* 17.

161 *Missouri* 142; *Goldberg*, 248 Cal. App. 2d at 885-86, 57 Cal. Rptr. at 476. *See also N.Y.U.* 17; *A.B.A.* 29-30; *cf. Van Alstyne* 600.

162 *N.Y.U.* 17.

163 *Id.*

164 *See Missouri* 137-38; *Goldberg*, 248 Cal. App. 2d at 885-86, 57 Cal. Rptr. at 476; *A.B.A.* 29-30.

165 *See* pp. 14-15 *supra.*

166 *See Van Alstyne* 608-11.

167 *Singletary* 12.

168 There is a good short discussion of this subject in *Georgia* at 14-15.

169 "... nor shall be compelled in any *criminal* case to be a witness against himself ..." U.S. Const. amend. V (emphasis added).

170 *Georgia* 14-15.

171 *Madera* 780, 786-89; *Goldberg*, 248 Cal. App. 2d at 883, 57 Cal. Rptr. at 475; *Missouri* 142; Callis, *The Courts and the Colleges: 1968*, the Journal of College Student Personnel 79 (March, 1969).

172 *Madera* 780, 786-89; *Goldberg*, 248 Cal. App. 2d at 883, 57 Cal. Rptr. at 475; *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 550-51 (S.D. N.Y. 1968).

## V. Right To A Private Or Public Hearing/Severance

### A. *Right To A Private Or Public Hearing*

Some authors suggest that student disciplinary hearings should be private,[173] presumably to protect the student from unfavorable publicity within the campus community. It would also have the effect of foreclosing student-led histrionics at the hearing, if there was organized support for the student or the "cause" involved in his breach of discipline.

It seems to me, however, that to declare that student disciplinary hearings *shall* be private is a bad place to start, since it fosters doubt as to the fairness of the hearing process. Assuming that the hearings *were* conducted in a fair manner, the university would be best served by having the community witness this fact, and, therefore, should favor public hearings.[174] To *require* that these hearings be public, however, has not been the case.[175] The decision should probably depend somewhat upon whether the mission of the university would be disrupted by public hearings, and somewhat upon the nature of the offense involved.[176] Naturally, the accused student should have the option to request a private hearing if he wishes;[177] or a hearing limited to a few observers of his choice, such as parents, attorney, or best friend. In addition, the hearing board should have the power to close the hearing to persons who would disrupt its proceedings, even to the extent of closing it entirely.

Following this practice, the school begins *favoring* open hearings, and proceeds to the less desirable closed hearing only if (1) the accused requests it, or (2) disruptions of the proceedings require it. In each case the closure would be *as slight as was necessary* to satisfy the need for a fair and impartial hearing.

### B. *Severance*

The question of severance poses another problem for the hearing board. What will the situation be when two or more defendants are involved in the same wrongful act and one or more of them wish a public hearing while the others wish a private one? If their cases are severed and heard separately,[178] the time that the board and the witnesses must spend on the hearing process is multiplied. There is also a risk that the result in the first hearing might prejudice the result in the second and later hearings, and that inconsistent judgments may result from multiple hearings. The *order* in which the cases were heard might therefore be a factor.

For all of these reasons, I would favor only one hearing on each set of facts. *Public* hearings should prevail in case of a conflict; with the public excluded during the testimony of, or cross-examination by, the parties requesting a private hearing. This practice would result in "fundamental fairness" to all parties; only one hearing of the facts, no prior prejudice to any party, and consistent judgments so far as they were merited on the facts.

## VI. Search and Seizure

This is a particularly tender issue, because the students' highly regarded, and jealously preserved, right to privacy is involved.[179] As the opportunities for privacy become fewer, it becomes more highly prized, and should be equally protected.[180]

The Constitution assures *all* citizens protection from "*unreasonable* searches and seizures."[181] This wording implies that there is such a thing as a *reasonable* search and seizure.

The standard set by the court is "reasonable cause to believe" that a law is being violated or other evil is present. This standard was applied to the university setting in *Moore* v *Student Affairs Committee of Troy State University*,[182] wherein the court states: "[The 'validity' of the search] is determined by whether the regulation [granting this power] is a reasonable exercise of the college's supervisory duty."[183] Or – in the absence of a regulation – was the search "necessary in aid of the basic responsibility of the

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[173] *See Georgia* 13; *cf. N.Y.U.* 28.

[174] *Cf. N.Y.U.* 28; *Zanders v. State Bd. of Educ.*, 281 F. Supp. 747, 768 (W.D. La. 1968).

[175] *Georgia* 13; *Missouri* 147-48.

[176] *Id.*

[177] *N.Y.U.* 28; *cf. Georgia* 13: "The decision on whether the hearing should be public or not has always been at the discretion of the college authorities. . ."

[178] *N.Y.U.* 28.

[179] *See N.Y.U.* 18-22; American Association of State Colleges and Universities, *Student Freedoms and Responsibilities* 4 (1968).

[180] *N.Y.U.* 18.

[181] "The *right* of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated. . ." U.S. Const. amend. IV (emphasis added).

[182] 284 F. Supp. 725 (M.D. Ala. 1968). The *Moore* case involved a student plaintiff whose dormitory room was searched by state health officials with the permission of university authorities. The fruits of the search – a small amount of marijuana – resulted in the student's "indefinite suspension" from the university. The student claimed that the university's regulation governing the search of dormitory rooms, as well as the search itself, violated his Constitutional rights. The search was conducted in the student's presence, but without his permission.

The Court found that "a reasonable right of inspection is necessary to the . . . [university's duty to operate an educational institution] even though it may infringe upon the outer boundaries of a dormitory student's Fourth Amendment right [against unreasonable search and seizure]" (p. 730) and dismissed the suit.

The Court stated that the "standard of 'reasonable cause to believe' to justify a search by college administrators – even where the sole purpose is to seek evidence of suspected violations of law – is lower than the Constitutionally protected criminal standard of 'probable cause'" (p. 730). The *Moore* decision provides an excellent discussion of the law relating to dormitory searches and seizures. It is highly recommended.

[183] *Id.* at 729.

institution regarding discipline and the maintenance of an 'educational atmosphere' . . ."[184]

It should be apparent, therefore, that a legal search should have a *reasonable basis and a reasonable goal.* It should not be a mere "fishing expedition" for information about, or against, students. Searches which are not based on the need to maintain discipline, or an educational atmosphere,[185] should be enjoined, and (conceivably) the evidence obtained therefrom should not be permitted to be introduced in any student disciplinary hearings.

Each university should develop and publish its own rules governing search and seizure; relating them to (1) the extent to which the university intends to exercise control over student life, and (2) legitimate supervisory needs in order to maintain discipline and an educational atmosphere. Every *reasonable* privacy should be given to the student.

## VII. Warrants

The idea of obtaining a search "warrant" is commonly associated with the concept of "search and seizure."[186] While any thorough or premeditated search is the fit subject of a "warrant" requirement, the immediate need to investigate certain areas of the university's property may not make "warrants" feasible in all search situations. At these times, the property *right* of the university to investigate wrongdoings on its property, and the personal *right* of the student to privacy may be in essential conflict. Whatever the solution of this problem, it should be carefully worked out between administrators – particularly those responsible for student dormitories – and students.

Because the personal activities of the student – to be wrongful – should have some *damaging* effect on the community and its educational mission, searches should be limited to such instances. Where situations of this description can be shown, warrants should be obtainable from any member of the hearing board assigned to hear cases of the type being investigated. When critical circumstances exist (*e.g.*, fire, loud noise) an entry may be justified without a warrant. In either case the entry should have *sufficient provocation by community standards,* and a wrong which is *coincidentally* discovered during the search should not become the subject of a disciplinary action. Reasonable standards should be set for the procurement of a search warrant, and one should be sought whenever the circumstances make it practicable.[187]

## VIII. Record Keeping

The institution's policy of record-keeping in university disciplinary matters should always be kept carefully in line with the seriousness of the offense, and its long-term bearing on the student's intellectual fitness. Because universities do not hold themselves out as "finishing schools," wrongdoing which reflects chiefly on the student's emotional or moral persuasions should not become a matter of permanent record. Consequently, the university should provide that minor disciplinary matters, or matters which relate more to adolescent growth patterns than deep-rooted personal flaws, will *not* be permanently recorded. If a disciplinary matter *is* important enough to appear in the student's permanent record, *an adequate explanation should be attached.*[188]

An excellent and detailed discussion of recording disciplinary actions may be found in the *New York University* booklet at pages 20-22.

## IX. Return To The Community

Theoretically, a student who is expelled should *never* be allowed to return to the educational community from which he was expelled. If an expelled student *is* allowed to return it is not really expulsion at all but rather *suspension* of some type. For the reasons explained at page 18, *supra,* expulsion should never be used as a disciplinary sanction when the university contemplates readmitting the student offender.

The process of gaining readmission to the university varies with the type of exclusion; to wit:

### A. *Expulsion.*

Readmission must be applied for by an extraordinary petition either to the admissions office, the dean, the president, or the disciplinary board which excluded the student. This process is hard to describe because, technically, it should not be taking place at all. If expulsion means expulsion, then *no* provisions should be contemplated for the student's return to the community, and no guidelines for the process would exist. Because *any* petition for return would be extraordinary, it would have to be directed to the person or organization that would be in the

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[184] *Id.* at 729.

[185] A good discussion of this issue may be found in *N.Y.U.* at 18-20. A lesser one is contained in *Georgia* at 19-20.

[186] *See* p. 23 *supra.*

[187] A good discussion of this topic may be found in *N.Y.U.* at 18-20. A lesser one is contained in *Georgia* at 19-20.

[188] *N.Y.U.* at 20 would give a student the right to challenge the "accuracy" of any entry in his record. While I do not endorse this sweeping a right, it does suggest that *permanent* entries in the student's record should not be the decision of a single individual, but should receive the concurrence of a majority of an appropriate hearing board. This suggests that *permanent* entries be limited to hearing board decisions.

[189] *N.Y.U.* 18.

most likely position to exercise competent authority over the readmission of an "expelled" student, as noted above.

B. *Suspension.*

The suspensions described at page 18, *supra,* do not pose the same problem as "expulsion," because they *contemplate* readmission within their terms, *i.e.,*

1. Suspension – Term: The student is *automatically* readmissible by the proper authority, (*e.g.,* admissions office) to the first regular term of instruction for which he is eligible following the termination of the fixed time period for which he was suspended. Because petition to the proper authority is all that is required, no disciplinary review need take place.

2. Suspension – Conditional: The board which suspended the student (or its successor) must review the student's petition for readmission alleging that he has fulfilled the required conditions. If a majority of the board agrees that the conditions have been fulfilled, they can authorize his readmission. This "review" is equivalent to a "hearing" and processes sufficient to insure its "fundamental fairness" should apply.

## X. Morals/Dress

Different institutions, exercising different degrees of control over the life of their students, may find it necessary – or expected – that they specify certain codes with regard to such things as the moral behavior or dress of their students.

This is generally a bad practice.[189] It (1) purports to govern student behavior in an area which has little or nothing to do with the educational mission of the school, (2) takes positions which may be unduly subjective, and (3) is almost impossible to enforce.

Code of conduct provisions which suggest that "dress and behavior [should] be appropriate to the situation," although vague, will probably be sufficient to suggest that *some* judgment should be exercised in these areas, and that appropriate measures will be taken if it is not. This permits prosecution for *patently* inappropriate behavior or dress, without purporting to enforce minor details of an inappropriate code which may produce unwanted conformity.[190] It is also a flexible standard, which can alter with changing community norms without the necessity of constantly rewriting highly detailed codes of dress or behavior. The cited language is probably not "unconstitutionally vague," because the doctrine of "vagueness" "does not, in the absence of exceptional circumstances, apply to standards of student conduct."[191]

The university's lack of intention to closely supervise personal behavior, however, should be adequately publicized to both students, parents, alumni, and the general public. (See page 26, *infra*.)

## XI. Non-Appearance For Proceedings

Some universities have treated the accused student's appearance at disciplinary proceedings as *fundamental* to fair process. This is not necessary.

What *is* necessary for a fair process is only the *opportunity* to be heard. This implies that the student has been sufficiently advised of the charges against him, and their possible consequence, and has been given the opportunity for a "hearing." Whether he actually *takes* that opportunity is not important.[192]

This does not mean that appropriate processes need not be observed in hearing evidence, weighing facts, and rendering judgment if the accused student is not present, however. He is entitled to "due process" whether he is present or not. It does mean that an accused student may decide not to contribute to his own defense. But, he must be given an election.

This approach to non-appearance also prevents the student from blocking the progress of the disciplinary process simply by not appearing. This principle is akin to the legal concept of "confession of judgment." In other words, the accused is appraised of the accusation, the evidence against him, and the penalty, and he simply does not feel that he has an adequate defense. It is the procedural equivalent of "confessing" guilt in the first place, except that the student who *refuses* to confess guilt is entitled to a "fair" hearing, and *no guilt can be presumed* from his simple non-appearance. Under these circumstances, he does not admit guilt, nor does he waive "due process," but he does imply that he will *accept the judgment* of the tribunal. Consequently, the tribunal is obligated to afford the same "due process" as if the defendant were present – but he will not present a defense in the hearing. In so doing, however, he does not lose his right to appeal based on the inadequacy of process, although he may not appeal the evidence or decision. In addition, he may appeal the severity of the punishment assessed.

## XII. The Power To Hire University Counsel

A state attorney general, upon whom many public colleges rely, has many more demanding responsibilities than student disciplinary hearings, probably has little expertise in the area, and would probably not be able to devote adequate time to even a serious student disciplinary case. It is desirable, therefore, for the university to hire an attorney of its own to handle these and other important cases. A recent group of cases clearly indicates that the

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[190] *See generally N.Y.U.* 18.

[191] *Missouri* 146.

[192] *Barker* 234. *See* p. 12 *supra* for the salient features of the "opportunity to be heard."

state attorney general need not be relied upon for all university legal matters, and that the institution – as a separate public corporation – has the power to retain its own counsel.[193]

Moreover, most college communities have a number of young attorneys for whom contact with the university would be a plus, and who might be excellent liaisons – having rapport with the students and the respect of the administration – in dealing with internal student-institutional legal problems. These persons could easily match wits – and legal jargon – with any "self-taught" student lawyers, rather than concede important points as some administrators have been inclined to do in the heat of argument when confronted with legal principles with which they are unfamiliar.[194]

Another potential source of help is the National Association of College and University Attorneys, 625 Grove Street, Evanston, Illinois 60201. To the university counsel who are members, the association provides an exchange of legal information on pertinent cases.

If the university does not have the authority to retain its own counsel, it could easily add a faculty member with legal training, and assign to him the increasingly popular "legal" courses at the college level (such as constitutional law, individual rights and liberties, and federal-state relations). The university could append to his teaching duties certain key advisory functions, including advice regarding the legal rights of students.

## XIII. Public Education

Finally, I would urge more public education concerning the proper role of the university in today's society.[195] Because universities have long attempted to be all things to all people, there has been an unconscious assignment to them of all of the blame for all of the actions of all of their students – or recent students. Far worse is the university's apparent willingness to *accept* that blame. This creates an improper burden and an unnecessary defensiveness whenever the university is faced with an unsavory act of any of its members.

The university is a special, not a general, purpose community.[196] It should take more initiative in stipulating this fact in its catalogs, handbooks, and in the public press. Only when the university affirmatively limits its responsibility to the proper and maintainable limits of its power and authority, and communicates this intent clearly and positively to its publics (the students, their parents, the alumni, and the public at large) will the university avoid being the scapegoat for all the country's ills and every whim of every student.

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[193] *People ex rel. Bd. of Trustees of Univ. of Ill. v. Barret*, 383 Ill. 321, 46 N.E.2d 951 (1943); *Blair v. Bd. of Regents for Okla. Agr. & Mechanical College*, 421 P.2d 228 (Okla. 1966).

[194] Stamp, *Comment*, 45 Denver L.J. 663, 664 (1968).

[195] *See* Cashman, *Comment*, 45 Denver L.J. 578, 579 (1968).

[196] *See* note 39 *supra*.

# CONCLUSION

It should be obvious by now that "due process" is not a fixed process. Rather, it is a sliding scale of procedural guarantees which increase in number and quality with the gravity of the wrongdoing, and, consequently, the seriousness of the penalty faced. It should also be obvious that a student is entitled to *some* due process *whenever* he is accused of wrongdoing for which he might be punished. The process "due" him, however, may range from a mere opportunity to defend his action to a dean in the case of a very minor offense, all the way up to a full disciplinary hearing for an act which might result in his suspension from the academy.

It is impossible to generalize about student codes and disciplinary systems except to say that they should follow the structure and special character of the university for which they are designed. A sample hearing system, and a variety of related topics, have been discussed in this paper. It is hoped that these discussions will be helpful to you in any re-examination or restructuring of your disciplinary system. They are not intended as a panacea, however, nor as a substitute for each university's developing its own disciplinary system.

It should be a fitting conclusion, then, to state the two extreme sides of the issue, and allow each institution to set its disciplinary standards – hopefully with some assistance from this paper – *within* the extremes.

On one hand, the student achieves very little by insisting upon his undeniable rights as a citizen of the United States. These rights are, in fact, quite limited, and are usually far fewer than the so-called "rights" he is accorded as a student. Moreover, it is doubtful that any student can learn very much in an environment in which he is given no more rights or freedoms than those which he is *guaranteed* by law.

On the other hand, the university contributes to its problems by taking hard positions from which it will subsequently retreat under pressure. The university should not take any stand which it would later modify without a sufficient change in circumstances. If the university does take a well-considered stand, it must be willing to stand by it. If that stand is extralegally threatened, the university must prosecute the offenders according to its rules. To do less simply contributes more force to the idea that "violence *does* pay."[197]

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[197] Chronicle of Higher Education, June 10, 1968, at 4, cols. 4-5.

# SAMPLE STATEMENT CONCERNING STUDENT "DUE PROCESS"

Many college presidents have expressed a desire to have a concisely worded statement concerning student "due process". Such a statement would advise students and their parents of the existence of a university disciplinary system, and notify them of the standards of conduct and the penalties for failing to observe them. A statement of this sort is functional only to the extent that it is brief and to the point. It must rely upon reference to more detailed documents concerning rules, codes, disciplinary machinery, etc., for its full development.

Following is as good a *general* statement as I have been able to draft. On pages 75 and 76 of this paper I mention the affirmative role the university should take in re-educating the general public as to the university's legitimate and proper role in institutional rule-making and rule enforcement. Consistent with that position, this sample statement, or an appropriately designed substitute (if not the disciplinary codes and machinery upon which it rests) should receive the *broadest* public attention.

## Sample Statement

_____ University recognizes the student's right, as an adult member of society and as a citizen of the United States of America, to respect and consideration and to the Constitutionally guaranteed freedoms of speech, assembly, and association. The university further recognizes the student's right within the institution to freedom of inquiry, and to the reasonable use of the services and facilities of the university which are intended for his education.

In the interest of maintaining order on the campus and guaranteeing the broadest range of freedom to each member of the community, some rules have been laid down by the students and other members of the university community acting in concert. These rules reasonably limit some activities and proscribe certain behavior which is harmful to the orderly operation of the institution, and the pursuit of its legitimate goals. All students are held to be informed of these rules which are printed in . . . (*e.g.*, the Student Handbook) and distributed at . . . (*e.g.*, registration).

If any student is accused of a violation of any of these rules and he denies guilt, he is guaranteed a speedy and fair hearing before an appropriate hearing board. Appropriate due process safeguards have been built into the procedures which govern each of these boards so that no permanent or recorded penalty shall be meted out until the student accused shall have had a fair chance to be heard. Appropriate appeals are allowed from the decisions of these boards.

## LIST OF ABBREVIATIONS

1. *A.B.A.* – American Bar Association, *Report of the American Bar Association Commission on Campus Government and Student Dissent* (1970) (unpublished draft).

2. *Barker* – *Barker v. Hardway*, 283 F. Supp. 228 (S.D. W.Va. 1968), *aff'd without opinion*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969) (Fortas, J., concurring).

3. *Dixon* – *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 286 U.S. 930 (1961).

4. *Esteban I* – *Esteban v. Central Missouri State College*, 277 F. Supp. 647 (W.D. Mo. 1967).

5. *Esteban II* – *Esteban v. Central Missouri State College*, 290 F. Supp. 622 (W.D. Mo. 1968).

6. *Georgia* – Institute of Higher Education, University of Georgia, *The Legal Aspects of Student Discipline in Higher Education* (1969).

7. *Goldberg* – *Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

8. *Knight* – *Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961).

9. *Madera* – *Madera v. Board of Education*, 386 F.2d 778 (2d Cir. 1967).

10. *Missouri* – *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (W.D. Mo. 1968).

11. *Monypenny* – P. Monypenny, *The Student as a Student*, 45 Denver L.J. 649 (1968).

12. *N.Y.U.* – New York University School of Law, *Student Conduct and Discipline Proceedings in a University Setting* (1968).

13. *Perkins* – J. Perkins, "The University and Due Process," Annual Meeting of the New England Association of Colleges and Secondary Schools, in Boston, Dec. 8, 1967, in J. Perkins, *The University and Due Process* (published by the American Council on Education 1967), also in *Chronicle of Higher Education*, Dec. 21, 1967, p. 5.

14. *Singletary* – O. A. Singletary, *Freedom and Order on Campus,* American Council on Education (1968).

15. *Van Alstyne* – Van Alstyne, *The Student as University Resident*, 45 Denver L.J. 582 (1968).

16. *Wasson* – *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967).

# HIGHLY SELECTED ANNOTATED BIBLIOGRAPHY

This bibliography was prepared with the busy college president, student personnel administrator, legal counsel, and student leaders in mind. As a result it is far from exhaustive. It has been strictly limited to those few sources which I consider absolutely essential. Even these limited sources have been carefully annotated so that a busy person will not waste time locating the material he seeks.

One caution, however: All the items listed comprise only a minimal reading list. None is so complete that it will provide the reader with the full and integrated understanding he will need to discuss the current topic intelligently. Partial understanding – as a result of partial reading – is discouraged.

The division of the materials into "required" and "suggested" readings only suggests that some items are more fundamental than others. Truly "supplemental" sources have not even been included in this bibliography.

For the more ambitious, fuller bibliographies may be found in New York University School of Law, *Student Conduct and Discipline Proceedings in a University Setting* (1968) at 31-36, and 45 Denver Law Journal (1968) at 612-13.

## Treatises

O.A. Singletary, American Council on Education, *Freedom and Order on Campus* (1968). 16 pages. *Required.*

For its length, *Singletary* is undoubtedly the most readable, concise, complete, sophisticated and quotable treatise on the subject of "student rights" and "due process".

To the sophisticated reader Singletary's accurate synthesis of considerable legal and editorial material approaches brilliance in completeness and literary style. To the unsophisticated it is still an excellent and highly readable over-view of the subject matter, and is highly quotable.

The paper's great shortcoming is that it fails, through intentional lack of footnoting, to identify the many rich and varied sources upon which it draws for its brief but excellent commentary.

Although there is little here that is genuinely new to anyone well-read in the area, there could be no better text for someone setting out on a study of student-institutional disciplinary practices for the first time, or for a seasoned veteran who thinks that he may have "lost the forest for the trees", and needs a refresher course. The principal topic headings are:

1. Background Considerations
2. Fundamental Principles of an Internal System of Order
3. Rules and Regulations
4. Student Violations
5. Sanctions
6. The Campus and the Courts.

Institute of Higher Education, University of Georgia, *The Legal Aspects of Student Discipline in Higher Education* (1969). 28 pages. *Required.*

The *Georgia* booklet is a fairly comprehensive study of the salient legal considerations between the student and the university in the area of student discipline. As its title clearly indicates, *Georgia* takes a distinctly legal approach to its subject matter. Its discussion is aimed almost exclusively at the legally sophisticated. Consequently, it is relatively spare in its presentation of any issue, providing only the principal legal facts and considerations. It is particularly short on philosophy and reasoning (cf. *N.Y.U., infra*).

For the legally unaware, however, *Georgia* gives a good assessment of legal requirements in the area of student discipline. Unlike *Singletary (supra)* it is abundantly footnoted, but almost exclusively with case citations. Furthermore, it is fairly comprehensive (if somewhat thin) in its coverage of the law in each of the many legal areas involved in the student-institutional relationship. It is far more comprehensive in this respect than either *N.Y.U.* or *A.B.A. (infra),* or any other single document that I have read. *Georgia's* major sections are:

1. Nature of Discipline in Higher Education (pp. 1-2)
2. Relationship between Students and the Schools (pp. 2-6)
3. Relationship between Courts and Education (pp. 6-9)
4. Due Process in Disciplinary Proceedings in Higher Education (pp. 10-20)
5. Equal Protection in Disciplinary Proceedings in Higher Education (pp. 20-21)
6. Judicial Intervention in Scholastic Affairs (pp. 21-22)
7. Private Colleges and Universities (pp. 22-23)
8. Guidelines for Disciplinary Proceedings in Public Institutions of Higher Education (pp. 23-25)
9. Conclusions (pp. 25-26)

Section Four, "Due Process in Disciplinary Proceedings in Higher Education" (pp. 10-20), is particularly full and useful.

This booklet is definitely rewarding reading. It should be read together with *N.Y.U. (infra)* to gain the fullest theoretical and legal picture of the subject under study.

Institute of Higher Education, University of Georgia, *The Legal Aspects of Student Discipline in Higher Education* (1970). 65 pages. *Required.*

This monograph is an up-dated and expanded version of the *Georgia* booklet just mentioned. Its principal strengths are its currentness – a primary consideration in any area of the law – and its organization and expanded discussion of certain relevant legal topics. These include due process, right to counsel, and jury trial. It is a better document than the earlier *Georgia* booklet, although it is equally legal, in that it treats the topics in much the same manner as they are treated in this paper. It is unquestionably an important addition to the basic library on student due process.

New York University School of Law, *Student Conduct and Discipline Proceedings in a University Setting* (1968). Proposed codes with commentary and Bibliography. 36 pages. *Required.*

The *N.Y.U.* booklet is an intelligently drawn document which may relate more to the community being studied (New York University) than to the academic community as a whole. It also tends to be quite liberal in its approach to student regulation and discipline, so that it may not receive wide acclaim on more conservative campuses. Nevertheless, the booklet combines succinct statements on the matters being studied with hard-headed legal and philosophical analysis. Its most unfortunate drawback is that it is lightly, if substantively, footnoted. Its most rewarding virtue is its rich commentary, which often supplies the reasoning and philosophy behind student regulations and court decisions which *Georgia (supra)* neglects.

The booklet is excellent on the subject of "Student Rights and Responsibilities" (pp. 9-24), and fairly sound (if quite abbreviated) on the relationship between students and the university and the "Rationale for Student Discipline" (pp. 4-7 and 7-8, respectively). The paper is full, although by no means exhaustive, on the "Rationale of [University]

*N.Y.U.* also contains a rather extensive bibliography of books, pamphlets, symposia, articles, notes, bibliographies, university code of conduct reports, and legal cases (pp. 31-36).

The booklet is definitely rewarding reading. It should be read together with *Georgia (supra)* to gain the fullest theoretical and legal picture of the subject under study.

American Bar Association, *Report of the American Bar Association Commission on Campus Government and Dissent* (1970) (unpublished draft). (American Bar Foundation, Chicago, Illinois). 49 pages (page references are to the unpublished draft). *Suggested.*

In August, 1967, the Board of Governors of the American Bar Association authorized the appointment of a Commission on Campus Government and Student Dissent, and "charged it with the responsibility to develop legal standards, procedures, and administrative guidelines relevant to student unrest and campus violence" (p. 1).

A number of distinguished educators, practicing attorneys, and law professors were appointed to the Commission, under the co-direction of law Professor William Van Alstyne – a prolific writer in the area under study. After several months of study, the Commission released the first draft of its report in February, 1970 (Chronicle of Higher Education, February 24, 1970, p. 1, col. 4, and pp. 2-3) – the "draft" report referred to herein. One week later the House of Delegates of the American Bar Association postponed action on the report until August, 1970, declining to "commend the guidelines framed by the commission for the careful consideration of educators, students, and others concerned with campus government" (Chronicle of Higher Education, March 2, 1970, p. 4, col. 4).

Considering the distinguished membership of the Commission and the sweeping responsibilities with which they were charged, the report – as it presently stands – must be considered something of a failure. It is probably *precisely* because of the sweeping charge, and the fact that lawyers and educators do not always approach the subject under consideration in the same way (*cf. Singletary* and *Georgia, supra.*), that the report was not more of a success. The lawyers had the better part of it, however, for the report is far more notable for its technical (legal) points, than for its general ones.

It is probably well beyond the scope of any commission, no matter how distinguished, to adequately present the plenitude of considerations on this subject at both public and private institutions in a single 49-page paper. Thus, the paper's general weaknesses should not be allowed to overshadow its strong points.

After a long (12 page) introduction, which contains no news to anyone who is familiar with the area under discussion, the report presents a very excellent discussion on *The Protection of Freedom of Expression* (pp. 12-24). Beginning with the *Tinker* case (*Tinker v. Des Moines School District*, 393 U.S. 503 (1969), the section continues through discussions of "Freedom of Association" (pp. 15-16), "Speech and Assembly" (pp. 17-18), "The Press" (pp. 19-21), and "Within the Classroom" (pp. 21-22), covering both "Public" (pp. 15-22) and "Private" (pp. 22-24) "Colleges and Universities." (The public school – private school distinction gave the commission difficulty throughout the report.)

The next section, *The Maintenance of Order with Justice*, subsection A, "University Disciplinary Procedures" (pp. 26-35), is much weaker, with the exception of its subdivision on rule-making (pp. 27-30). There is also a large subdivision on "Representation of [the] Accused" (pp. 31-32), which suggests that "[a] student should have the right to be represented at [his] hearing by any person selected by him" including "a lawyer" (p. 31). The Commission did recognize, however, the potential problems of professional counsel (an "atmosphere sometimes characteristic of criminal trials"), allowing that it would be "most unfortunate" if this situation developed. The Commission also stated that in "complex" cases it may be desirable to have counsel on *both* sides of a student-institutional hearing. (pp. 31-32).

In subsection B, "Relationship Between Campus Authority and Civil Authority" (pp. 35-48), there is a good discussion of "Injunctions" (pp. 36-38) and "Criminal Sanctions" (pp. 39-43). There is also some good material on "Legislative Denial or Revocation of Financial Assistance" (pp. 45-47), generally disapproving it.

On the whole the *A.B.A.* report is a short, tight, fairly readable document. Much of it will come as no news to anyone who is well-read on the topic, however. The complexity of the Commission's task – covering large and small, public and private, rural and urban institutions, all in one document – caused them to shy away from conclusions, and to satisfy themselves with a light discussion of the more prominent problems and some "available" solutions. This is not necessarily bad, however, for there is something of worth in the report for everyone. But – because it is broad and brief – the report tends to be somewhat superficial even in those areas which it does cover.

Because the final document is likely to be short, readable, multifaceted, and precise where it is deep, it will probably be well worth reading in its entirety, and a valuable source on the points mentioned above, if they remain in the final draft.

## Model Codes

Committee on Student Rights & Responsibilities, Law Student Division, American Bar Association, *Model Code for Student Rights, Responsibilities & Conduct* (1969). (Law Student Division, American Bar Association, Chicago, Illinois). 15 pages, including commentary. *Suggested.*

The *Model Code* may be of *some* use to those who are about to embark upon drafting such a code. It suffers chiefly from being overly broad, and abbreviated to the point of being shallow. Neither is it a "balanced" docu-

ment, but is heavily weighted in favor of students. Its organization, and the precision and balance of its presentation, leave a great deal to be desired. In organization and content it seems to rely heavily on *N.Y.U. (supra.)*.

The "commentary" which follows the model code, and comprises more than half of the 15 page document, is considerably more useful than the code upon which it comments. The *Model Code* may be worthwhile to have at hand, but it is hardly a fundamental document. It will provide a general idea of code organization, but you would do just as well to design your own code along lines relevant to your campus.

M. Peebles, *Passage of Student Codes* (1969). (Publication of the Association of Student Governments, Washington, D.C.). 15 pages. *Suggested.*

The *Passage of Student Codes* is an extremely well-written and succinct outline of the considerations and techniques involved in drafting, presenting, and securing the "passage" of student-drawn "codes". Although the document was prepared chiefly to assist students with their activity in this area, it is no less applicable to cooperative efforts between students, faculty and administrators.

The pamphlet is brief, astute and "worldly-wise" in the points that it makes, and extremely well-balanced in tone and in the topics it covers. Its essential divisions are:

1. Introduction and Definitions (pp. 1-5)
2. Initial Steps (pp. 6-7)
3. Committee Work (pp. 8-9)
4. Presentation of the Document (pp. 9-10)
5. Final Implementation (pp. 10-11)
6. Drafting Tips and Techniques (pp. 11-12)
7. Appendix – Possible Topical Headings (pp. 13-14)

The pamphlet's rationale for an organized, cooperative approach – together with the necessary ingredient of considerable time and effort – are clearly expressed and underscored by the success of the Magaziner Report at Brown University, and other successful student efforts.

## Law Journal Articles

### The Denver Law Journal, Volume 45 Number 4

*Legal Aspects of Student-Institutional Relationships*, 45 Denver L.J. 497-678 (1968), 182 pages. For the most part, *not* recommended.

In mid-May 1968, the University of Denver College of Law, in conjunction with the American Council on Education, convened a three-day conference in Denver, Colorado. They invited to the conference a select group of 45 educators, administrators, lawyers, and students to discuss the topic "Legal Aspects of Student-Institutional Relationships." The outcome of this conference was Volume 45 *Denver Law Journal* Number 4, cited above. Considering the distinction of the personalities in attendance and the forum at hand, the result should have been a high water mark in legal understanding of the student-institutional relationship. Unfortunately, it was not.

Despite the fact that the authors and commentators were assigned their topics in advance of the conference – and revised them subsequent thereto in light of the discussion that had occurred – there is an appalling overlap and lack of continuity to the materials. Even this might have been excused if there had been some simple, well-documented conclusions, but there were few. As a consequence, I cannot truly recommend this *entire* issue of the *Denver Law Review* to you as much more than an exhausting rehash of what was already pretty well-known. A few articles do merit special attention, and I have undertaken to mention them below.

McKay, *The Student as Private Citizen*, 45 Denver L.J. 558 (1968). 13 pages. *Required.*

This is a short, well-written article which sticks closely to its subject matter, which is: What control should a university attempt to exercise over the actions of its students taken in the larger community *outside* of the university? Dean McKay briefly and succinctly develops the issues and considerations in each of a large variety of relevant areas – including a brief sojourn into the policy regarding student expression *on* campus.

The author's basic premises are quite close to those expressed in the *N.Y.U.* booklet (*supra*), chiefly a "hands off" attitude toward student actions in the community *outside* of the university which do not relate to the university's function, as well as their activities *on* campus which are not genuinely disruptive of the university's educational mission.

Because Dean McKay was a member of the study group that developed the *N.Y.U.* booklet, it may be assumed either that his thinking is well-reflected therein, or that he was influenced by the deliberations of that group (which preceded the Denver conference by several months). While the *N.Y.U.* booklet is much broader in scope, the McKay article rather fully develops the section relating to the university's responsibility for student behavior in the general community. The article can properly be viewed as a valuable extension of the *N.Y.U.* booklet in this area.

*The Student as Private Citizen* is as well-developed a short presentation as one is likely to find on this subject, and in my opinion, is required reading for anyone about to undertake the difficult task of defining the university's responsibility and concern for the actions of its students in the community outside of the university.

Cashman, *Comment*, 45 Denver L.J. 578 (1968). 4 pages. *Required.*

This article is really a "comment" on Dean McKay's article (*supra*), and (as the author suggests) is less intended to modify them than to supplement and extend them. It is a short and somewhat opinionated article, which raises a number of points in rapid order, but develops none of them fully. Among them:

1. Too much is done in the name of "public image". "We need to educate the community to our goals and methods – not to alter those methods and goals in order to preserve an ethereal image" (p. 578).
2. The author finds very few justifiable distinctions between on-campus and off-campus behavior. "[W]hat is expected of the student in terms of behavior on the campus should also be expected away from campus" (p. 579).
3. He questions the "desirability" of "order [on the campus] for its own sake" (p. 580).
4. He strongly urges "flexibility" in dealing with disorders (p. 580).
5. He suggests a new "role" for the campus police force.

Basically, the article presents a student-personnel point of view, and takes Dean McKay's remarks some liberal distance beyond what I think he intended. Nevertheless, this "comment" is a good counterpoint to the McKay article, and the two can be read together with valuable results.

Monypenny, *The Student as a Student*, 45 Denver L.J. 649 (1968). 14 pages. *Required.*

This is an excellent article, which proceeds in a rather folksy, common-sense manner to summarize some of the best thinking at the Denver conference. As a summary, it analyzes more than it advocates and is devoid of rigid format.

The chief function of the article is to remind students, faculty, and administrators alike, that:

1. Legal theories concerning the student-institutional relationship are not an end in themselves, but merely a starting point in analyzing institutional goals and the division of function and responsibility necessary to achieve them.
2. Because education serves a public function, there is naturally some community interest in, and responsibility for, the conduct of the university.
3. All parties in the educational community interact. It is not rare for one of them to overreach the rigid legal bounds of his authority, power, or responsibility.
4. Decisions must frequently be made affecting the lives of persons who are simply not in a position to directly influence those decisions. Consequently, the university structure should provide for the broadest possible input of opinion from all sectors of the community, so that decisions – when made – will receive the broadest possible acceptance.

This article is highly recommended for those who have gotten enmeshed in the narrow technicalities of legal argumentation, and have lost sight of the real nature and operation of a university community.

Clifford, *Comment*, 45 Denver L.J. 675 (1968). 4 pages. *Suggested.*

Dean Clifford's article was intended as a "comment" on Professor Monypenny's article (*supra*). It does not direct itself to that task, however, but deals instead with entirely new issues under the same general heading, "The Student as a Student". The article begins by suggesting a "hidden agenda" for the conference (not the *legal*, but the *institutional* role of the student), which was introduced several times, but never pursued (truthfully). He follows by suggesting that the student might be better viewed as a participant ("colleague") rather than an object ("foster child") in the educational process.

The author also suggests the possibility of regulations for *all* members of the academic community, and an assumption in favor of student maturity and responsibility rather than against it. He is quick to add – but not elaborate – that "colleague" does not mean "equal".

For its length, the article is delightfully provocative. It should be read by all student personnel officers. Unfortunately, it is too brief to fully develop the practical need for, or manner of achieving, the student-as-colleague norm. Nevertheless, there are some worthy ideas in this article, which could be easily – and more relevantly – developed at the local level.

Lucas, *Comment*, 45 Denver L.J. 622 (1968). 21 pages. *Required.*

This is an extremely well-written and immensely readable (if obviously partisan) article concerning the constitutional rights of students as university "citizens". It is a "comment" on Professor Van Alstyne's article, *The Student as University Resident*, 45 Denver L.J. 582 (1968). In this lengthy "comment", law Professor Lucas concerns himself particularly with the right of students to 1) assemble and petition; 2) demonstrate; 3) associate (organize); 4) publish newspapers; and 5) invite speakers to campus.

His immensely readable commentaries on these subjects are filled with good illustrations and case citations, and develop in admirable detail the current legal parameters of these activities on college campuses. Although Professor Lucas personally feels that the courts have not gone far enough or fast enough in expanding students' rights, his legal analysis of what is currently required in the areas mentioned above is comprehensible and thorough. Needless to say, it is still a long way from the ideal situation Professor Lucas envisions.

There is an opening section on the reasons for the student movement, which (student personnel administrators will recognize) indicates some of the flaws in Professor Lucas' perception of that movement. There is also a closing item concerning the ways in which "educators, attorneys and organizations" can help to achieve a more ideal student community, a community not as absent as Professor Lucas implies. On balance the piece suffers from the subject-matter not being as black (college administrators) and white (students) as the author implies, but his analysis of the legal positions taken to justify a large variety of hard-to-explain curtailments of student activity (pp. 624-40) is excellent, and well worth reading.

## Other Law Journal Articles

Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. Rev. 368 (1963). 27 pages. *Required.*

This interesting and oft-quoted article is now somewhat dated, but not so much so that it should not be included in an up-to-date bibliography. The article begins by remarking at a survey conducted by the author which showed that most universities studied failed to offer standard "due process" safeguards to their students facing disciplinary procedures. The situation has drastically changed today, but there is reason to believe that many universities still fail to offer their students the "due process" to which they are entitled in disciplinary proceedings. Professor Van Alstyne's article is notable (and quotable) for the following material:

1. An opening section in which the author discusses some of the traditional arguments in support of summary university discipline procedures, including *in loco parentis*. He then proceeds to *logically* destroy *in loco parentis* as a justification for summary discipline akin to the parent-child relationship. Very instructive.
2. There follows an excellent (and still timely) discussion of student "due process" as that concept was then viewed in the light of the *Dixon* and *Knight* cases (*infra*).
3. The next portion of the article discusses the balancing of individual rights against institutional inconvenience in the light of two recent Supreme Court cases on that subject (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 [1951] and *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 866, *rehearing denied* 368 U.S. 869 [1961]) to determine just what "process" is "due". (The same cases are discussed in *Knight [infra]* at 177-78.) This is an excellent discussion of "balancing" interests to arrive at a "process" fair to both parties, and is still quite timely. The author also suggests some procedural standards for "cases of alleged student misconduct", but I believe that

the value of these standards has altered with time, if not in the author's opinion as well.

Professor Van Alstyne closes with a short, but excellent, discussion of *substantive* due process.

From beginning to end this article is still fresh, readable, pithy, and highly instructive.

## Cases

*Dixon v. Alabama State Board of Education*, 186 F. Supp. 945 (M.D. Ala. 1960). (United States District Court for the Middle District of Alabama, 1960). 9 pages. *Suggested.*

The first *Dixon* case is of little interest today except for the historical perspective it provides. The reversal of this decision by the Fifth Circuit Court of Appeals (*Dixon v. Alabama State Board of Education*, 294 F.2d 150 [1961], *infra*), and the subsequent approval of that decision by almost every court handling a major student "due process" case, as well as the refusal of the Supreme Court to review that decision, has pretty well eclipsed any value the District Court's logic or reasoning in the first *Dixon* case might have had.

Still the case is instructive, because it indicates how narrow the decisions in these difficult cases can be. Both the District Court and the Court of Appeals cited many of the same precedents. The District Court simply found itself interpreting the precedents conservatively at a time when individual rights were being expanded. The Court of Appeals did not criticize the District Court for its point of view, but simply found that they had "misinterpreted the precedents". (294 F.2d at 157).

The first *Dixon* case remains valuable, therefore, because it reflects the generally accepted state of the law, and the point of view of the courts, prior to the landmark second *Dixon* decision (1961). The first *Dixon* case is also a well written exposition of the conservative point of view of student-institutional relationships in disciplinary cases. Now this is all past history, for the second *Dixon* case, and later cases, have changed the situation.

*Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 286 U.S. 930 (1961). (United States Court of Appeals for the Fifth Circuit, 1961; review denied, United States Supreme Court, 1961). 16 pages (including a 7 page dissent). *Required.*

The second *Dixon* case, the appeal of the prior case decision, is – as mentioned in footnote 4 – the granddaddy of the recent strain of student "due process" decisions. This is not because it marked the first occasion on which a student challenged institutional authority. Rather it was because the decision gave a student almost a Constitutional "right" to notice and a hearing before he could be expelled from a public university, and because the court spelled out with some particularity the due process safeguards to which a student was entitled when facing serious institutional penalties.

The narrow (2-1) decision, with a considerable (7 page) dissent, gained some strength when the U.S. Supreme Court declined to review it (*cert. denied*, 286 U.S. 930 [1961]), and considerably more strength as it was subsequently approved by almost every major student "due process" case decision (including all of the college-level cases cited in this bibliography). Now, it is safe to say that this case is the ranking model for student "due process" cases.

The second *Dixon* case involved a number of students attending a state supported college, who were seeking an injunction to restrain the State Board of Education from obstructing their right to attend that college. The students were expelled or placed on probation, selectively, for their involvement in a lunch counter "sit in" and other civil rights activities which allegedly disrupted campus life. The students were not given any notice or hearing and were advised of their dismissals via letter. The issue was a simple one: does " 'due process' [require] notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct" (p. 151). The court held that it did, and reversed the District Court (first *Dixon, supra*).

In doing so the Court of Appeals observed that "the State cannot condition the granting of even a privilege upon the renunciation of the Constitutional right to procedural due process" (p. 156), and that there "must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement" (p. 157). The most interesting part about the case is that the court spells out quite clearly (at page 159) the "rudimentary elements of fair play" which they considered would "fulfill" the "requirements of due process of law" in student expulsion cases in public colleges. Interestingly enough, the court *does not* include the right to legal counsel in these "requirements".

The dissent involves itself in a lengthy discussion of "due process" as it applies to the facts of this case (which receive light treatment by the majority), and concludes that the requirements of due process *were* met – generally following the logic of the District Court in the first *Dixon* decision.

The entire opinion – majority and dissent – is *required* reading, particularly page 159 where the requirements of procedural due process in public college expulsion cases are clearly spelled out.

*Esteban v. Central Missouri State College*, 277 F. Supp. 647 (W.D. Mo. 1967). (United States District Court for the Western District of Missouri, 1967). 4 pages. *Required.*

This case, *Esteban* I, and the two decisions which follow (*Missouri en banc* and *Esteban* II), comprise – like first and second *Dixon* – an instructive "group" of cases. The *Missouri* and *Esteban* decisions involve the same set of facts, and – read together – trace an interesting legal growth in the development of student "due process" standards, a growth which at this point seems to have ceased to shift in favor of the student and appears to be achieving some sort of equilibrium, based on second *Dixon*, *Missouri* and *Esteban* II. All three cases in this "group" are *required* reading.

*Esteban* I involved two students who were seeking an injunction to allow them to continue their studies at Central Missouri State College. Both students were suspended from the college for their involvement in a traffic-stopping "disturbance" in a public roadway adjacent to the college campus. The facts suggested that there may have been other actionable behavior as well, but the students' contribution to the "disturbance" was clearly the central issue. Both students were given an opportunity to explain their actions to the Dean of Men, and advised that they were "entitled to appeal to the President of the College" (p. 650) before they were dismissed.

The Court stated that the issues were two: 1) whether the students were entitled to procedural due process *before* they were suspended, and, if so, 2) whether they received it. Then, citing *Dixon* and other intermediate cases, the court found that students are entitled to due process "before they can be suspended from [a state] college" (p. 651), and that these students did not receive the process to which they were entitled. *(Cf. Barker infra).*

Then – reminiscent of the second *Dixon* case – the court proceeded to list the "procedures to be followed in preparing for and conducting [the students' hearings]," *including* a hearing before the President of the College, "counsel" to "advise" (not represent?) the students at the hearing, and the right of the students (*not* counsel) to cross-examine witnesses against them (pp. 651-52).

This dictum is a *considerable* extension of the standards laid down in the second *Dixon* case. If it had been allowed to stand unchanged, it would have required reasonably strict legal standards – including legal counsel – for student disciplinary hearings in public colleges, and would have been, this author believes, the furthest extension of students' rights in disciplinary hearings to date. As the next two annotations will make clear, this decision did not remain unchanged.

This case was returned to the college authorities for hearings consistent with the court ruling.

*General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (W.D. Mo. 1968). (United States District Court for the Western District of Missouri *en banc*, 1968). 16 pages. *Required.*

Shortly after the decision in *Esteban* I came down, the Federal District Court for the Western District of Missouri met *en banc* (all judges sitting) to set some "judicial standards" for "student discipline" cases in "tax supported institutions of higher education." The meeting was not held to prejudice any of the "major cases" (including *Esteban* II) then pending before the court, but, rather, to "develop uniform standards" to be applied to these cases, "and to ensure, as far as practicable, that . . . future decisions in similar cases [within the District] would be consistent" (p. 133).

Nevertheless, an *en banc* decision is an unusual judicial procedure. Consequently, this has to be viewed as a significant milestone in the growing body of law concerning student disciplinary cases. Actually, it is probably the most important court decision involving student "due process" which has come down since second *Dixon*. The lengthy decision covers many areas of institutional and judicial concern, including 1) the historical relationship between the courts and education, generally announcing a "non-interference" policy unless "erroneous and unwise actions . . . deprive students of federally protected rights or privileges" (pp. 135-36); 2) a detailed listing of the "lawful missions of tax supported [institutions of] higher education" (pp. 137-41); 3) the "obligations of a student" (p. 141); 4) the nature of student discipline compared to criminal law, noting that student disciplinary procedures are *not* criminal in nature, and, therefore, not entitled to classic criminal protections (pp. 142-43); 5) procedural and jurisdictional standards (largely technical and statutory); and 6) an extensive section devoted to the substantive and procedural standards to be observed in student disciplinary proceedings (pp. 144-48).

In this last section the court points out in cogent, understandable, and quotable language the major points of concern and the standards which must be observed in order to meet the substantive and procedural requirements of student "due process". I have not found as thorough a discussion of this subject in any court decision which I have read. Any college administrator would do well to master this entire, rich discussion. It cannot be recommended too highly.

*Esteban v. Central Missouri State College*, 290 F. Supp. 622 (W.D. Mo. 1968). (United States District Court for the Western District of Missouri, 1968). 11 pages. *Required.*

The second *Esteban* case is, in a sense, a victory for the schools. Following the institutional hearings prescribed by this court in *Esteban* I, Esteban and Roberds were again dismissed from Central Missouri State College. They responded by filing a second suit, alleging that their Constitutional rights to procedural and substantive due process had been violated by the institution.

The second *Esteban* case gave the District Court an opportunity to re-examine the entire proceeding in the light of the *Missouri en banc* decision, which had come down since the first *Esteban* case had been decided.

As a result, the Court (in an 11 page decision) goes into a much more detailed discussion of both the facts and the law involved in the case, including worthwhile discussions of "substantial evidence," "exhaustion of remedies," "ripeness," "state action," the non-criminal nature of student disciplinary proceedings, the non-requirement of court-like proceedings, "lawful educational mission," "vagueness" as a defense, and the circumstances under which federal courts will intervene in student-institutional disciplinary proceedings.

Following this long and rich discussion (which translated substantial amounts of the *Missouri en banc* decision into case law) the students' complaint was dismissed. There is absolutely no mention in *Esteban* II of the fairly hard legal requirements laid down by this court in *Esteban* I. It may be fairly inferred, therefore, that the Court retreated from the more extreme view it had taken in *Esteban* I (*supra*) in favor of the more informal processes laid down in second *Dixon* and *Missouri en banc*, and now echoed in *Esteban* II. It left the institution to be guided chiefly by the principle that its disciplinary procedures be "reasonable and fair."

*Esteban* I, *Missouri en banc*, and *Esteban* II, should be read as a progressive series. As such, they are extremely instructive and highly recommended.

*Barker v. Hardway*, 283 F. Supp. 228 (S.D. W.Va. 1968), *aff'd without opinion*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1965). (United States District Court for the Southern District of West Virginia, 1968; affirmed by the United States Court of Appeals for the Fourth Circuit, 1968; review denied, United States Supreme Court, 1969). 12 pages. *Required.*

The *Barker* case was brought by ten suspended public school students to enjoin enforcement of their suspension from Bluefield College. The facts showed that prior to their suspension the students were involved in a peaceful demonstration against the leadership of Bluefield State. Following that demonstration, several demonstrators (the plaintiffs) engaged in violent and threatening activities aimed at the president of the college (Hardway), and in violation of college rules and regulations. (A non-violent "sing-in" was excused as unactionable).

Being unable to contact the offending students, the college mailed letters of suspension to each of them, notifying them of the reasons for their suspension, and of their right to "appeal" to the "Faculty Committee on Student Affairs" (notice and hearing). All ten requested a hearing, but six withdrew when they were denied legal counsel. Of the four who continued, two were reinstated. All ten students joined in seeking a court injunction. After a rather full discussion of a variety of legal issues the court dismissed the students' complaint.

The *Barker* case is similar to the first *Dixon* case in many respects, but with the opposite result. Here the students

were found to have been given adequate notice and hearing, even though the hearing followed, not preceded, the suspension announcements. This case is noteworthy for its discussion of "notice and hearing" (pp. 233-34), the need for pre-existent rules (pp. 234-35), "judicial restraint" (p. 235), "reasonableness and fairness in view of all the facts and circumstances of the particular case" as "the touchstone of . . . due process" (p. 237), and the non-surrender of constitutional rights as a condition of entering the academy (p. 238). It is most notable, however, for its statements concerning the "power" of the "president . . . to formulate rules and regulations" and the "authority" of college "officials" to "keep order" (p. 235); the non-requirement of "legal counsel" to meet the standards of "due process" in student disciplinary hearings (the fact that this was only an "advisory" hearing seems to be an afterthought) (pp. 236-38); and the "*presumption*" of "good faith" on the part of school authorities in the exercise of their authority (p. 237 – emphasis added).

This case goes a long way toward fleshing out the second *Dixon* and *Esteban* II decisions. It is further strengthened by the fact that the U.S. Supreme Court refused to review it, 89 S.Ct. 1009 (1969). Highly recommended for its ideas and wording.

*Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961). (United States District Court for the Middle District of Tennessee, 1961). 9 pages. *Suggested.*

The *Knight* case involved thirteen students at Tennessee A & I State University who were arrested and convicted of "disorderly conduct" for their participation in certain "freedom rides". They were all suspended from the University without notice or hearing, pursuant to a regulation which required prompt suspension of any student "convicted" of a "criminal offense" involving "personal misconduct". The students sued for an injunction, alleging that the school's action had violated their right to due process, and on other grounds. The court found that the other grounds lacked merit, but agreed with the students that they had been denied due process, and ordered the University to provide for notice and a hearing to decide whether the students should be reinstated.

On its face, this holding would seem to be just another "due process" decision requiring "notice and a hearing" – following the rule in second *Dixon* (p. 177). It is instructive, of course, to learn that a formula which defines suspendable conduct does not – in and of itself – determine whether such conduct actually occurred, and, if a student objects, he must be given an opportunity to defend against this conclusion. This procedure in the instant case would have allowed the hearing board to judge for itself whether the plaintiffs' conduct involved "personal misconduct" or not (p. 179-81). There are other cases equally good on these points, however.

The *Knight* case has been placed in the bibliography for its excellent discussions of "due process", the "balancing" of individual rights against institutional interests which "due process" implies (p. 177-78), and the "value" of a higher education, which, it seems to me, gives fair warning that the courts do not incline to be timid where this "valuable right" is placed in jeopardy (p. 178).

*Goldberg v. Regents of University of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967). (California State Court of Appeals, First District Division Two, 1967). 20 pages (page citations are to Cal. App. 2d). *Suggested.*

The *Goldberg* case is the appeal of a state court proceeding in mandamus to compel the University of California to reinstate four students who were suspended or dismissed from the university following notice and a hearing. The Superior Court of Alamedo County dismissed the complaint, and the student plaintiffs appealed. This court affirmed the lower court decision and dismissed the complaint. A petition for hearing by the Supreme Court of the State of California was denied.

The facts show that the students involved did on several consecutive days violate university regulations relating to "acceptable standards of . . . conduct" in protesting (in various ways) the arrest and removal from campus of a non-student (footnotes 2-4, pp. 871-72). The university took extraordinary pains to insure notice and a fair hearing (pp. 871-73), despite which the plaintiffs contend that the action of the discipline committee "was an unconstitutional limitation on their First Amendment rights, was taken pursuant to a constitutionally vague regulation, [and] deprived them of procedural due process . . ." (p. 870). This court found, in a long and technical decision, that the students had received "due process", and their complaint was dismissed.

The activities of the student-plaintiffs were disruptive from the beginning, so the case is extremely instructive with regard to the behavior of a hearing board under these trying circumstances. The plaintiffs' tactics also produced many highly technical legal arguments touching on the rights of "free speech" and "due process". Because most of these arguments have been more directly and succinctly dealt with in other cases cited herein, I will not outline them here. The Court's language is chiefly useful in filling in minor gaps left by the broad principles enunciated in those cases, and the Court's basic response is that student "due process" does not have to meet formal law court standards to be fair.

Three points within the case invite greater attention:

1. The "power" of the University "to formulate and enforce rules of student conduct that are appropriate and necessary to the maintenance of order and propriety" (p. 879).

2. The oft-quoted language that "in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in a large measure, be left to the educational institution itself" (p. 880).

3. The opinion that, when students are accused of violating both university regulations and civil law, the university is under no obligation whatever to await the outcome of the civil proceedings before proceeding with its own, nor to reach the same conclusion regarding the guilt or innocence of the students involved as was reached in the civil proceeding (pp. 885-86).

*Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967). (United States Court of Appeals for the Second Circuit, 1967). 7 pages. *Suggested.*

The *Wasson* case was an appeal from a decision of the U.S. District Court for the Eastern District of New York (269 F. Supp. 900), which denied without hearing a cadet's motion to stay his expulsion from the United States Merchant Marine Academy. Wasson had been dismissed from the Academy, following intra-institutional hearings, for having accumulated too many "demerits". The Court of Appeals, in reversing the District Court and remanding the case to it, did not find that "due process" had been denied to Wasson, but simply that it was impossible for the District Court to determine whether it had or not until it had heard

evidence concerning the procedures employed by the institution in dismissing him. Therefore, the District Court should not have dismissed his suit without hearing.

This case is an interesting one because it involves the federal government, not a state government, in the operation of a federal school, not a state school. It therefore rests on the due process clause of the Fifth Amendment (federal) not the Fourteenth (state). It also involves the conduct of a military cadet, which is generally thought to involve a higher standard of behavior than that required of students in other "public" schools; and a military academy, which is generally thought to have more control over its students than the normal "public" institution. It is instructive to learn, therefore, that even in this highly controlled and authoritarian situation the student *still* has a right to due process.

I have included the case in this bibliography not for these reasons, however, but because it contains an excellent passage on "balancing" individual rights against institutional interests (pp. 811-12); further fortifies the theory that counsel is not a prerequisite to "due process" in student disciplinary hearings (p. 812); and introduces the important new point that an "impartial trier of fact" is fundamental to a "fair hearing" (p. 813).

Like other cases in this bibliography, this decision is laced with material relating to "due process" and "notice hearing".

*Madera v. Board of Education*, 386 F.2d 778 (2d Cir. 1967). (United States Court of Appeals for the Second Circuit, 1967). 12 pages. *Suggested.*

The *Madera* case was an appeal from a decision of the U.S. District Court for the Southern District of New York (267 F. Supp. 356) "enjoining the Board of Education of the City of New York and others from conducting a District Superintendents' guidance conference to consider the situation of a pupil suspended for disciplinary reasons without affording the pupil and his parents the right to be represented by legal counsel." The Court of Appeals held that "due process" did "not require that [the] pupil, who had been suspended . . . for behavioral difficulties, be represented at [a] guidance conference by an attorney," reversed the District Court's decision, vacated its injunction, and dismissed the complaint.

This decision can be distinguished from the previous cases cited, insofar as it involves a grade school pupil, not a college student, attending a public grade school system which requires attendance, rather than a public college where attendance is optional. It may be further distinguished insofar as a great deal is made of this being *only* a "guidance conference" (pp. 780-83) which does not require counsel (pp. 784-86), although it is hard to see the distinction between this and formal disciplinary proceedings when the dismissal and reassignment of the pupil is likely to result (the court, however, distinguishes *Wasson*, *Dixon*, and *Knight*, p. 784).

Despite these distinctions (which future courts may or may not find material), this case contains an abundance of instructive language concerning the fact that 1) "guidance conferences" are not "criminal" in nature (pp. 779,782, 786-88); 2) the "requirements" of "due process" are relative to the "nature of the proceeding" (pp. 780, 785-86 – citing *Dixon*) (and this is certainly true whether the proceeding involves a public college student or a grade school pupil); 3) "representation by counsel is not an essential ingredient to a fair hearing in all types of proceedings" (pp. 785, 786-89) (*ditto*); and 4) a "hearing" is required at some stage before a "final order" becomes effective (p. 785) (*ditto*). The case also contains an excellent discussion of "due process" which would be equally applicable to public college students as to grade school pupils (pp. 780, 784, 785-86).

The most notable new point in this Court's decision, and the reason I cite it, is the suggestion (at p. 786) that, if one side in the proceeding is represented by counsel, the other side should be as well; and if one side is not represented by counsel, it is defensible that the other side also be denied. This is basically a "balancing" theory.

In spite of its differences from the college situation, the discussion and holding in *Madera* are most instructive.

*Woods v. Wright,* 334 F.2d 369 (5th Cir. 1964). (United States Court of Appeals for the Fifth Circuit, 1964). 7 pages. *Suggested.*

The *Woods* case was an appeal from a decision of the U.S. District Court for the Northern District of Alabama (the full District Court decision is cited at footnote 2, p. 372 of this case), refusing to restrain the superintendent of schools from enforcing an order of the board of education directing the suspension or expulsion of public grade school pupils for violating a city ordinance against parading without a license. The Court of Appeals held that when suspension or expulsion from school pending a hearing might result in "irreparable injury" to the student, a temporary restraining order should have been granted; reversed the District Court's decision, and remanded the case to them (p. 375).

The students involved were suspended or expelled (depending upon their age), pursuant to a letter of the Superintendent of Education (Wright) stating that the "policy of the Board of Education has been suspension or expulsion of students who have been arrested for any offense until proper hearings may be conducted. . ." (p. 372). The students were advised by letter of their suspension or expulsion, 16 days after the "parade" (a "peaceful demonstration" against "racial segregation") took place (p. 371). No notice or hearing was given, although a "fair and comprehensive hearing" was apparently contemplated as soon as time permitted (footnote 2, p. 373).

The *Woods* case suffers from the same problems of relevance as does *Madera*, as both cases involve public grade school pupils, not college students. The holding in *Woods* is fundamental enough, however, to believe that it would apply equally to both situations. Reminiscent of *Knight (supra.)* the court refused to dwell on "due process", stating that this was an issue of fact for the District Court to determine in the first instance (p. 374).

It seems to me that two instructive rules can be withdrawn from the *Woods* decision: 1) a suspension or expulsion which damages the student *prior* to a "hearing" *may* be the fit subject of a court injunction, even though a subsequent hearing is planned (pp. 373-34). (This would probably not be so, however, in the case of a "temporary" suspension which did not survive the need to restore order, or when the reinstatement of the suspended student could be shown to pose some "imminent danger" to the college – neither of which was the case in *Knight* or *Woods*); and 2) the denial of a constitutionally protected right invites immediate court attention, and, when "imminent threat of irreparable injury" is involved, action (pp. 374-75). Clearly, both of these rules would apply to a college case as well as to that of a public grade school pupil.